TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted]3

GEORGE D. BRYAN, COLLECTOR OF THE PORT OF CHARLESTON, PETITIONER,

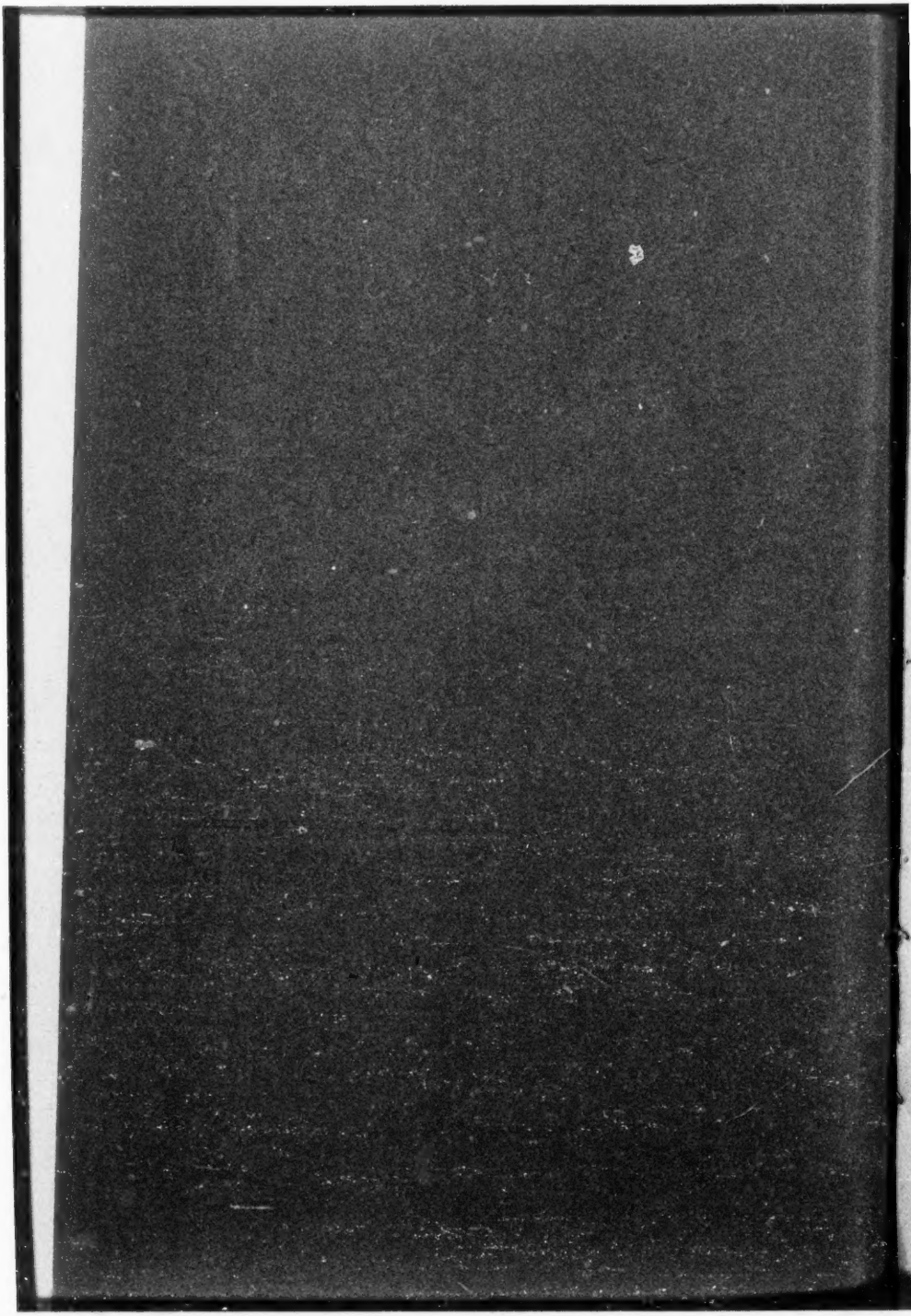
vs.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 24, 1911.
CERTIORARI AND RETURN FILED NOVEMBER 15, 1911.

(21,863)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 273.

GEORGE D. BRYAN, COLLECTOR OF THE PORT OF CHARLESTON, PETITIONER,

vs.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the Circuit Court of the United States for the District of South Carolina	1	1
Caption	1	1
Summons for relief	1	1
Complaint	2	2
Marshal's return of service	4	3
Answer	4	4
Notice of motion to substitute executrix as plaintiff	6	5
Order substituting executrix as party plaintiff	8	7
Notice of objection to taking deposition	9	7
Return of service	9	8
Notice to suppress deposition	10	8
Order for use of district court jurors to try case	11	9
Trial of cause and verdict	11	9
Judgment	12	10
Order extending time signing bills of exceptions	13	11
Order extending time for bill of exceptions	13	11
Bill of exceptions	14	12
Testimony of C. W. Townsend	17	14
Testimony of Thaddeus Street	18	16
Deposition of Martin Johansen	22	19
Deposition of Phineas E. Thurston	23	20
Testimony of R. W. Hutson	24	21
Testimony of V. P. Clayton	27	23
Testimony of Paul Moore	27	23

	Original.	Print.
Transcript from the Circuit Court of the United States for the District of South Carolina—Continued.		
Bill of exceptions—Continued.		
Testimony of C. B. Simons	29	24
Testimony of John P. Hunter	30	26
Testimony of George D. Bryan	31	27
Testimony of Charles Rasmussen	36	31
Testimony of Julius Seabrook	39	34
Testimony of J. P. K. Bryan	41	36
Deposition of Martin Johansen	42	37
Deposition of Phineas E. Thurston	46	41
Deposition of Roxana S. Ker	51	46
Exhibits in evidence	52	47
Libel	52	47
Charter	55	49
Stipulation	61	53
Monition	62	54
Claim	63	55
Stipulation for costs	64	56
Answer to motion	65	57
Exception to claim	66	57
Order to release vessel on giving bond	66	58
Bond to marshal	67	58
Power of attorney from the American Banking and Trust Company of Baltimore to T. Moultrie Mordecai	68	59
Decree	70	60
Bill of sale of registered vessel	70	61
Certificate of registry	73	63
Exemplification	75	64
Will of William W. Ker	76	65
Telegrams	79	67
Letters	80	68
Motion to direct verdict	81	69
Charge	82	69
Exceptions	84	71
Petitions for writ of error and assignment of errors	86	73
Allowance of writ of error	89	75
Appeal bond and approval	89	75
Writ of error	91	77
Citation	92	78
Service of citation	93	78
Order to transmit record	93	79
Clerk's certificate	93	79
Record entries	95	79
Stipulation as to filing briefs	95	80
Hearing	97	80
Opinion	97	80
Judgment	105	86
Petition to stay mandate	105	87
Order staying mandate	107	88
Clerk's certificate	107	88
Return to writ of certiorari	110	88
Stipulation as to return	111	89
Writ of certiorari	112	89

a Transcript of record. United States Circuit Court of Appeals, Fourth Circuit. No. 808. Roxana S. Ker, executrix of W. W. Ker, deceased, plaintiff in error, versus George D. Bryan, collector of port of Charleston, defendant in error. In error to the Circuit Court of the United States for the District of South Carolina, at Charleston. Record Filed March 26, 1908.

1 TRANSCRIPT OF RECORD.

Caption.

The United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit, to wit:

At a Circuit Court of the United States for the District of South Carolina, begun and held at the court-house, in the city of Columbia, on the first Tuesday of November, 1907, being the 5th day of the same month, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable William H. Brawley, United States judge for the District of South Carolina.

Among other were the following proceedings to wit:

ROXANA S. KER, EXECUTRIX OF WM. W. KER, PLAINTIFF,
versus
GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant. } At law.

Summons for relief.

Filed October 12, 1896.

The United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT OF THE STATE of Pennsylvania, plaintiff,
against
GEORGE D. BRYAN, A CITIZEN AND RESIDENT OF THE STATE of South Carolina, collector of the port of Charleston, defendant.

To George D. Bryan, collector of the port of Charleston, defendant in this action:

2 You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, No. 11 Broad St., Charleston, S. C., on or before the Rule day,

occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, the 10 day of October, anno Domini, one thousand eight hundred and ninety-six and in the 120 year of the sovereignty and independence of the United States of America.

M. C. BUTLER,
J. P. K. BRYAN,
Plaintiff's Attorney.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Complaint.

Filed Oct. 12, 1896.

United States of America, District of South Carolina, Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT OF the State of Pennsylvania, plaintiff,
against
GEORGE D. BRYAN, A CITIZEN AND RESIDENT OF the State of South Carolina and collector of the port of Charleston, defendant.

The plaintiff above named complaining of the defendant above named, alleges:

First. That the plaintiff was at the time hereinafter mentioned, and is now, a resident and citizen of the State of Pennsylvania. And the defendant was at such times and is now a resident and citizen of the State of South Carolina, and collector of the port of Charleston.

Second. That at the times hereinafter mentioned the plaintiff was the owner of the American steamship "Laurada," a merchant vessel of the United States, of the burden of eight hundred and ninety-nine tons, registered at the port of Philadelphia.

3 Third. That on the sixteenth day of November, 1895, the said steamship "Laurada," being in the port and harbor of Charleston proceeding, with her officers and crew on board, in the due fulfilment of her freight engagements as a merchant vessel of the United States, the said George D. Bryant, claiming to act as a collector of the port of Charleston, and in the name of the United States, unlawfully seized and cause to be seized, the said steamship "Laurada" and under an alleged authority and direction of the Government of the United States unlawfully and wrongfully detained the

said steamship "Laurada" at the custom house wharf in the port and harbor of Charleston in the District of South Carolina and refused to allow said steamship to proceed in the due fulfilment of her freight engagements for the space of twenty-one days, to-wit, from the 16th day of November, 1895, to and inclusive of the sixth day of December, 1895.

Fourth. That all such acts and doings of the said George D. Bryan, claiming to act as collector of the port of Charleston, and under an alleged authority and direction of and in the name of the Government of the United States, were without warrant of law, and all such allege, authority and direction of the United States Government were null and void.

Fifth. That by such wrongful and unlawful acts of the said George D. Bryan claiming to act as collector of the port of Charleston, this plaintiff has been injured in the loss of the use and earnings of said steamship to his damage five thousand dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of five thousand dollars.

M. C. BUTLER,
J. P. K. BRYAN,
Plaintiff's Attorneys.
WILLIAM W. KER.

Sworn to before me this 5th day of October, 1896.

THOMAS J. HUNT,
Notary Public of the State of Pennsylvania, Commissioner of Deeds of the State of South Carolina, at Philadelphia, Pa., No. 623 Walnut St.

4 *Marshal's return of service.*

United States of America, District of South Carolina, Fourth Circuit.

Paul Moore, Office Deputy U. S. Marshal, being duly sworn, says that he served the summons and complaint in this action on the defendant by delivering to him personally, and leaving with him copies of the same at Charleston, S. C., on the 12th day of October, A. D. 1896, and that he knows the person so served to be the one mentioned and described in the summons as George D. Bryan, Collector of the Port of Charleston, the defendant therein, and the deponent is not a party to the action.

PAUL MOORE,
Office Deputy U. S. M.

Sworn to before me this 12th day of October, 1896.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed Nov. 2, 1896.

Answer.

United States of America, District of South Carolina, Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT of the State of Pennsylvania, plaintiff,
against
GEORGE D. BRYAN, A CITIZEN AND RESIDENT of the State of South Carolina, and collector of the port of Charleston, defendant.

The defendant answering the complaint of the plaintiff herein, for answer thereto, sayeth:

FIRST.

For a first defense to the plaintiff's alleged cause of action.

First. That he admits the truth of the allegations contained in the first paragraph thereof.

Second. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph two thereof, and demands strict proof of the same.

Third. That he denies each and every other allegation in the said complaint contained, except as hereinafter stated; that true it is that, acting under instructions received from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the "Laurada" and formally take possession or charge of said vessel, and that he kept here in his custody and under his control for twenty-one days, but this defendant was then informed and verily believes that the said "Laurada" was then about to depart from the United States, with arms, munitions of war and men, constituting a military expedition, and was intended by her owners to commit hostilities upon the subjects and property of the Island of Cuba, a colony of the Kingdom of Spain, with which the United States was at peace, and that there was probable cause for such detention of the said vessel.

SECOND.

For a second defense to the plaintiff's alleged cause of action.

First. The defendant admits the truth of the allegations contained in the first paragraph thereof.

Second. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph two thereof, and demands strict proof of the same.

Third. That true it is, this defendant, acting under instructions from the Secretary of the Treasury of the United States, caused the

steam vessel "Laurada" to be formally detained by placing an inspector on board. But this defendant alleges that no injury or damage resulted to the plaintiff thereby, the said "Laurada" then being in custody of the marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Kerr & Co. against the steamship "Laurada;" that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895,
6 and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant.

WM. PERRY MURPHY,
Defendant's Attorney.

STATE OF SOUTH CAROLINA,
County of Charleston:

Personally appeared George D. Bryan, the defendant above named, who, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to such matter as is therein stated on information and belief, and as to such matter he believes it to be true.

GEORGE D. BRYAN,
Collector of Customs Port of Charleston, S. C.

Sworn to before me this 2nd day of November, A. D. 1896.
[Notarial seal.]

N. M. PORTER,
Notary Public for S. C.

Notice of motion to substitute executrix as plaintiff.

Filed January 30th, 1902.

United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT of the State of Pennsylvania, plaintiff,
vs.
GEORGE D. BRYAN, A CITIZEN AND RESIDENT of the State of South Carolina, as collector of the port of Charleston, defendant.

Personally appeared Roxana Ker, of the city of Philadelphia, State of Pennsylvania, who*m*, being duly sworn, makes oath that the plaintiff above named, Wm. W. Ker, her husband, departed this life on the 31st day of December, 1901, at Philadelphia, in the State of Pennsylvania, and that the deponent, his wife, named in his last will and testament as executrix thereof, has duly qualified as such executrix, and herewith attaches a certified copy of such appointment.

Wherefore she prays that she may, by order of this court, be admitted as a party plaintiff herein to prosecute this suit to final judgment.

ROXANA KER.

7 Sworn to before me this 24th day of Jany., 1902.

MARK D. JONES,
Notary Public.

Commission expires January 28th, 1905.

PHILADELPHIA CITY AND COUNTY, *ss:*

I, Jacob Singer, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify and make known, that on the 17th day of January, in the year of our Lord one thousand nine hundred and two, letters testamentary on the estate of William W. Ker, deceased, were granted unto Roxana S. Ker, she having first been qualified well and truly to administer the same.

Given under my hand and seal of office this 24th day of January, 1902.

[SEAL.]

CHAS. IRWIN,
Deputy Register.

United States of America, district of South Carolina, in the Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT OF THE State of Pennsylvania, plaintiff,
vs.
GEORGE D. BRYAN, A CITIZEN AND RESIDENT OF THE State of South Carolina, as collector of the port of Charleston, defendant.

To the Hon. John G. Capers, District Attorney, Charleston, S. C.:

Please take notice that on the affidavit hereto attached we will move the Circuit Court of the United States for the district of South Carolina, on the 30th day of January, 1902, at eleven o'clock a. m., or as soon thereafter as counsel can be heard, for an order substituting Roxana Ker, as executrix of the estate of William W. Ker, deceased, as party plaintiff to prosecute the above entitled cause to final judgment.

J. P. K. BRYAN,
Plff's Atty.

8 Service hereof acknowledged this 28th Jany., 1902.

JOHN G. CAPERS, *U. S. Atty.*
By B. A. HAGOOD, *Asst.*

Order substituting executrix as party plaintiff.

Filed 30 Jany., 1902.

United States of America, district of South Carolina, Circuit Court, Fourth Circuit.

WILLIAM W. KER, A CITIZEN AND RESIDENT OF THE State of Pennsylvania, plaintiff,
vs.
GEORGE D. BRYAN, A CITIZEN AND RESIDENT OF THE State of South Carolina, as collector of the port of Charleston, defendant.

Upon hearing and filing the petition of Roxana S. Ker, executrix of William W. Ker, and it appearing to the court that the plaintiff, William W. Ker, has departed this life on the 31st day of December, 1901, and his wife, Roxana S. Ker, has duly qualified as his executrix, and has petitioned this court to be admitted to prosecute this suit to final judgment.

On motion of J. P. K. Bryant, attorney for plaintiff and petitioner, after due notice to defendant's attorneys.

It is ordered that Roxana S. Ker, executrix of William W. Ker, deceased, be admitted as party plaintiff on the record to prosecute this action to final judgment in lieu of said plaintiff, William W. Ker, deceased.

CHARLES H. SIMONTON,
Circuit Judge.

30 JAN'Y, 1902.

9 *Notice of objection to taking deposition.*

Filed December 4th, 1907.

The United States of America, District of South Carolina, in the Circuit Court.

ROXANA S. KER, EXECUTRIX, PLAINTIFF,
against
GEORGE D. BYRAN, AS COLLECTOR OF THE PORT of Charleston, S. C., defendant.

To J. P. K. BRYAN, Esquire,
Plaintiff's Attorney:

Take notice that I shall object to any depositions taken under your notice, which is dated December 2d, 1907, and which has just been served upon me, on the grounds: (1) That the notice of the time and place of taking such depositions is not reasonable; (2) that the court will be in session at the time fixed for the taking of the depositions in your notice, and that my duties render it impossible for me

to appear and cross-examine at the time fixed in your notice; (3) that there has been unnecessary delay in taking the testimony of the witnesses by deposition mentioned in your notice; (4) That it is manifestly unjust and improper to take the testimony at this time under all the circumstances of the case; and (5) upon such other grounds as appear in the pleadings, facts, and circumstances of the case.

ERNEST F. COCHRAN,
U. S. Attorney, Defendant's Attorney.

Dated December 2d, 1907.

Return on service of writ.

UNITED STATES OF AMERICA,
District of South Carolina.

I hereby certify and return that I served the annexed notice on the therein named J. P. K. Bryan, by handing to and leaving a true and correct copy thereof with him personally at Charleston, in said district, on the 2d day of Dec., A. D. 1907.

J. D. ADAMS, *U. S. Marshal.*
By J. L. ADAMS, *Deputy.*

10 *Notice to suppress deposition.*

Filed December 9, 1907.

The United States of America, District of South Carolina, in the Circuit Court.

ROXANA S. KER, EXECUTRIX, PLAINTIFF,
against
GEORGE D. BYRAN, AS COLLECTOR OF THE PORT of Charleston, S. C., defendant.

To J. P. K. BRYAN, Esquire,
Plaintiff's Attorney:

You will please take notice that this case being set for trial this day at ten o'clock, and the deposition of Mrs. Roxana S. Ker having been just filed, I shall upon the opening of the court this morning at 10 o'clock, or as soon thereafter as counsel can be heard, move the court that the said deposition be suppressed and stricken from the files on the following grounds: (1) That the notice of the time and place of taking such deposition was not reasonable; (2) that the court was in session at the time fixed for the taking of the deposition in your notice, and that my duties rendered it impossible for me to appear and cross-examine at the time fixed in your notice; (3) that there has been unnecessary delay in taking the testimony of the witness by deposition mentioned in your notice; (4) that it was manifestly unjust and improper to take the testimony at this

time under all the circumstances of the case; and (5) upon such other grounds as appear in the pleadings, facts, and circumstances of the case.

ERNEST F. COCHRAN,
United States Attorney, Defendant's Attorney.

Dated Charleston, S. C., December 9th, 1907.

11 *Order for use of district court jurors to try case.*

Filed December 9, 1907.

The United States of America, District of South Carolina, in the Circuit Court.

ROXANA S. KER, EXECUTRIX, PLAINTIFF,
against
GEORGE D. BYRAN, AS COLLECTOR OF THE PORT of Charleston, S. C., defendant.

The above cause by agreement of counsel having been fixed for trial at Charleston at the present term of the Circuit Court for Monday, December 9th, 1907, with the further agreement to use the jurors in attendance upon the District Court at the present term now being held at Charleston for the trial of said cause, it is therefore

Ordered, That the present jurors now in attendance upon the District Court do serve as the jurors in the Circuit Court to be impaneled for the trial of said cause.

WM. H. BRAWLEY,
U. S. Judge.

DECEMBER 9TH, 1907.

Trial of cause and verdict.

At a stated term of the Circuit Court, begun and holden at Charleston, S. C., in the district aforesaid, on the 9th and 10th days of December, A. D. 1907, this case came up for trial before the following jury, which was selected, organized, and sworn, to-wit: L. E. Alford, Foreman, C. W. Frost, R. M. Hay, John Boykin, J. C. Blum, George Buist, N. C. Grubbs, B. Moody, Manning Richardson, W. J. Tilley, J. H. Hadwin, and W. B. Nixon. The complaint was read to the court and jury. Counsel for defendant entered an oral demurrer to the complaint on the ground that this court was without jurisdiction, and, after hearing counsel both for and in opposition, the court overruled the demurrer. The answer was read to the court and jury. The following witnesses were sworn and examined on behalf of the plaintiff, to-wit: C. W. Townsend and Thadeus Street. The depositions of Martin Johansen, Phineas E. Thurston, and Roxana S. Ker, the plaintiff, were read to the court and jury. The follow-

ing witnesses were sworn and examined on behalf of the defendant, to-wit: Richard W. Hutson, V. P. Clayton, Paul Moore, C. B. Simons, John P. Hunter, George D. Bryan, and Charles Ras-
12 mussen. The following witnesses were sworn and examined in reply on behalf of plaintiff, to-wit: Julius Seabrook. Counsel for defendant moved the court to direct a verdict for the defendant, and, after hearing counsel for and in opposition to the motion, the court directed the jury to find the following verdict:

Under the instructions of the court, we, the jury, find for the defendant.

L. E. ALFORD, *Foreman.*

DECEMBER 10TH, 1907.

Judgment.

Filed Feb. 29, 1908.

United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, PLAINTIFF,
against
GEORGE D. BYRAN, AS COLLECTOR OF THE PORT OF Charleston, defendant.

This action having been brought to a trial at a circuit court, held on the ninth day of December, A. D. 1907, and a verdict for the defendant having been rendered therein by the jury, and the costs having been adjudged at two hundred and eighteen 63/100 dollars,

Now, on motion of Ernest F. Cochran, U. S. attorney, attorney for said defendant, George D. Bryan, as collector of port of Charleston, it is adjudged that the defendant, George D. Bryan, as collector as aforesaid, recover of said Roxana S. Ker the sum of two hundred and eighteen 63/100 dollars, costs, which said costs, when recovered by said defendant, George D. Bryan, as collector as aforesaid, shall be for the benefit and use of the United States by whom the same were paid.

ERNEST F. COCHRAN,
United States Attorney, Defendant's Attorney.

Examined, signed, sealed, and enrolled this 29th day of February, 1908.

C. J. MURPHY,
[SEAL.] *C. C. C. U. S., Dist. S. C.*

13 *Order extending time signing bills of exception.*

Filed January 20, 1908.

United States of America, District of South Carolina, Circuit Court, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, deceased, plaintiff,
vs.
GEORGE D. BRYAN, COLLECTOR OF PORT OF Charleston, defendant.

On motion of M. C. Butler and J. P. K. Bryan, plaintiff's attorneys, is ordered:

That the time for signing and sealing bill of exceptions on writ of error to the United States Circuit Court of Appeals in this cause be extended until first day of February, 1908.

WM. H. BRAWLEY,
JANY. 20, 1908. *U. S. Judge.*

Order extending time for bill of exceptions.

Filed February 1st, 1908.

United States of America, District of South Carolina, Circuit Court, Fourth Circuit.

ROXANA S. KER, AS EXECUTRIX OF W. W. KER, deceased, plaintiff,
vs.
GEORGE D. BYRAN, AS COLLECTOR OF THE PORT OF Charleston, defendant.

On motion of M. C. Butler and J. P. K. Bryan, plaintiff's attorneys, with the consent of Ernest F. Cochran, United States attorney, defendant's attorney, it is ordered:

That the time for proposing amendments to and for settling and signing and sealing the bill of exceptions on writ of error to the United States Circuit Court of Appeals in this cause be further extended up to and including the 29th day of February, 1908.

WM. H. BRAWLEY,
U. S. Judge.

I consent.

ERNEST F. COCHRAN,
U. S. Attorney, Defendant's Atty.

1ST FEBRUARY, 1908.

14 *Bill of exceptions.*

Filed February 13th, 1908.

The United States of America, District of South Carolina, in the Circuit Court, Fourth Circuit.

ROXANA S. KER, AS EXECUTRIX OF WILLIAM W. KER, deceased, a citizen of the State of Pennsylvania, plaintiff,

vs.

GEORGE D. BRYAN, COLLECTOR OF THE PORT OF Charleston, defendant.

Be it remembered, that on the 9th day of December, 1907, at a regular term of the said court, begun and holden in the city of Charleston, in the district of South Carolina, before the Honorable William H. Brawley, the issues joined in the above entitled cause came on to be tried before the said judge, with a jury—the plaintiff being represented by the Honorable M. C. Butler and J. P. K. Bryan, esqr., and the defendant being represented by Ernest F. Cochran, esqr., United States attorney for the district of South Carolina, and Thomas W. Bacot, esqr., ass't United States attorney for the district of South Carolina.

The plaintiff introduced in evidence the following testimony and documentary evidence:

Mr. Cochran makes a motion for the suppression of the deposition of Mrs. Kerr, on the following grounds:

1. That the notice of the time and place of taking such deposition was not reasonable.

2. That the court was in session at the time fixed for the taking of the deposition in the notice served by plaintiff's counsel, and that his duties rendered it impossible for him to appear and cross-examine Mrs. Kerr at the time fixed in the notice.

3. That there has been unnecessary delay in taking the testimony of the witness by deposition mentioned in the notice.

15 4. That it was manifestly unjust and improper to take the testimony at this time under all the circumstances of the case.

5. And upon such other grounds as appear in the pleadings, facts, and circumstances of the case.

COURT. I think you can open the deposition, and if after examining it the district attorney feels that he ought to have had opportunity to cross-examine the witness the case would have to go over; I think that the notice in the circumstances was hardly reasonable, considering the engagements of the district attorney, and if upon examining the deposition he can say upon his responsibility that the justice of the case requires that he should have further time for cross-examination of that witness, the court will have to give him that opportunity.

Upon reading the deposition in question I am of opinion that there was hardly reasonable notice of the taking of this deposition, but upon the statement of counsel that he expected to have Mrs. Kerr here, and that on that account he did not give a notice that would have been reasonable, I think you had better go on with the trial; but if it should appear in the course of the trial that the Government is at disadvantage by reason of this short notice, and that the substantial interest of the Government would be endangered by having the case proceed, I may feel it necessary to stop the case; but at the moment it does not seem to the court that any substantial interest will be at hazard by having the case go on to trial. I can hardly see how the Government can be prejudiced by having this deposition admitted in the case, but if it should appear that it is I should feel that the Government has not had that reasonable notice which it ought to have.

Mr. COCHRAN. In order to preserve all rights I will ask your honor to allow an exception to be noted to the ruling in refusing the motion.

Motion overruled and exception noted.

Mr. Bacot makes a motion before the court relating to the jurisdiction of the court, as follows:

The defendant introduces objection to the jurisdiction of the court herein, for that it appears upon the face of the complaint that the United States is the real party defendant.

16 After argument of counsel on both sides motion is overruled, and exception noted by the defendant's counsel to the overruling of the demurrer.

Mr. BRYAN. We desire to put in evidence the correspondence between Mr. Butler and the collector, and without taking the original letters from the files of the custom-house, we have agreed upon a copy of the first letter, and we introduce first the letter of General Butler to the collector dated Charleston, S. C., November 20, 1895, which reads as follows: "My dear sir: We are informed that you are detaining the steamer 'Laurada' behalf the United States. We are desirous that she shall forthwith proceed and therefore beg to enquire if she may do so now, as we do not wish to advise conflict with the instructions of the Government of the U. S. We request an early reply."

(Signed) "M. C. BUTLER,
"*Counsel for S. S. 'Laurada.'*

"Please address me 11 Broad st., Charleston, S. C., P. O. Box 244."

Mr. Bryan also offers in evidence answer to the above letter of the same date Charleston, S. C., November 20, 1895, which reads as follows:

"Hon. M. C. BUTLER,
"*Counsel for the S. S. 'Laurada.'*

"MY DEAR SIR: Your favor of this inst. at hand, and in reply I beg to say that you are correctly informed in that I am 'detaining the steamer "Laurada" on behalf of the United States;' I could not

permit her to proceed as indicated in your letter, as my instructions are to detain her."

(Signed) "G. D. BRYAN, *Collector.*"

Mr. Bryan further introduces letter in evidence dated December 6, 1895, which is as follows:

"Hon. M. C. BUTLER,

"*Counsel for the S. S. 'Laurada,' Charleston, S. C.*

"SIR: I beg to inform you that, under the instructions from the Government, I have to-day withdrawn my inspector from the 'Laurada' and she is free, so far as this office is concerned."

(Signed) "G. D. BRYAN, *Collector.*"

17 C. W. TOWNSEND, sworn.

By Mr. BRYAN:

Q. Where do you reside?

A. Charleston.

Q. During the year 1895 what was your occupation?

A. Stevedoring.

Q. Business of loading ships?

A. Yes, sir.

Q. Do you remember the time that the "Laurada" was detained here?

A. Yes, sir.

Q. Previous to that time had the "Laurada" been in this port before?

A. Yes, sir.

Q. What kind of a steamship was she?

A. Ship of about 1,200 tons.

Q. Was she a merchant ship?

A. Yes, sir.

Q. What kind of trading had she done here?

A. Carrying pyrites cinders.

Q. What are pryrites cinders?

A. Well, it is the ore extracted—that is, the sulphur out of the ore that is used for a chemical purpose.

Q. How often had you loaded her previous to her seizure Nov., 1895?

A. About seven or eight times.

Q. At the time when she was seized and detained in November, 1895, do you remember the time she came in here?

A. I recollect her coming in here at that time.

Q. Who was going to load her at that time?

A. I was.

Q. Were you employed as stevedore to load her?

A. Yes, sir, I was, with her cargo of pyrites cinders.

Q. Where did she go to?

A. Savannah Railroad wharf.

Q. Did you load her?

A. No, sir.

Q. Were you ready aboard to load her?
A. Yes, sir.
Q. In the usual course of her previous loading?
A. Yes, sir.
Q. Why were you not allowed to load her?
A. I went aboard of her and the officer stopped me, would not let me.
Q. Officer of the United States?
A. Yes, sir.
Q. Custom-house officer, was that?
(Objected to by Mr. Cochran as leading.)
A. I think it was.
Q. Where was she afterwards taken?
A. To the custom-house wharf.
Q. Was she loaded at the custom-house wharf?
A. No, sir.
Q. How long does it ordinarily take to load a cargo of pyrites cinders?
A. About four days.
18 Q. On a vessel of this kind?
A. Vessel of that kind; yes, sir.
Q. Was the "Laurada" a merchant vessel?
A. Yes, sir.
Q. Was she a war vessel in any sense at all?
A. I did not see anything to indicate a war vessel.
(Mr. Cochran objects to the question as leading, and submits that the witness should state the facts and let the jury say whether she was a war vessel, and states that he is willing to admit that she was not in the service of the United States.)
Mr. BRYAN. Q. Was she a war vessel or a merchant vessel?
A. Merchant vessel.
Q. Was she built like a war vessel is built?
A. No, sir.
Q. Was she a merchant vessel, ordinary merchant vessel, or was she manifestly built for warlike purposes?
A. Merchant vessel.
Q. Was there anything about her that adapted her to war?
A. I never saw anything pertaining to war on her.
Q. How often did you see her?
A. I seen her about every week or two.
Q. When she came here did you go down into the hold of the vessel?
A. No, sir, I did not, they would not allow me, the officer stopped me.

Cross-examination:

Q. You don't know who the officer was?
A. I do not.
Q. You did not know his name, did you?
A. Well, I might have known it at that time.

Q. You don't remember now?
A. I do not.
Q. You just know that some officer stopped you?
A. Yes, sir.
Q. You don't know who he was at all?
A. No, sir.

THADDEUS STREET sworn.

By Mr. BRYAN. Q. What is your occupation?
A. Engaged in ship-broker business, handle vessels.
Q. For a how long a time?
A. I have been personally engaged for the last 27 years.
Q. In Charleston?
A. Yes, sir.
Q. In 1895 were you located in Charleston in such business?
A. Yes, sir.
Q. Do you remember when the steamship "Laurada" came to Charleston about the 15 of November, 1895?
A. I do, sir.
19 Q. Do you know if she was under charter at that time?
A. She was.
Q. For what purpose?
A. For the purpose of carrying cargo.
Mr. COCHRAN. They ought to produce the charter; it is in writing I suppose, and it is the best evidence.
COURT. It seems to me so.
Mr. BRYAN. Q. Whom did you represent?
A. Represented parties in New York.
Q. For what shipment?
A. For the shipment of this pyrites cinders from Charleston to some northern port.
Q. Was she to your knowledge as representing the shippers; was the engagement for her to take pyrites cinders?
A. Yes, sir.
Mr. COCHRAN. Q. Was not that a charter party in writing?
A. Yes, sir; there was a charter party.
Mr. Cochran then objects, without the production of the charter party.
Mr. BRYAN. Q. What has become of the charter party?
A. Charter party was returned to the shippers when it was impossible to fulfill the contract; we were only acting as the agents for parties in New York, and when it became impossible to carry out the conditions of the contract, as is our custom with every contract that we handle for them, we returned all documents to them; I returned all documents for that reason; we never retain any documents after the contract is complete.
Q. Do you to your own knowledge know that her detention here broke up that contract?
A. I do.

Mr. COCHRAN. The charter party he refers to he has not produced yet to show what the shipment was, and we object to anything with regard to that charter party, it not having been produced.

Mr. BRYAN. Q. Were you proceeding to load that ship?

A. We were prepared to do it.

Q. What stopped the loading of the ship at that time?

A. She was seized by the United States; the charterers naturally refused to allow the carload to go aboard the vessel, while she was under seizure.

Q. Do you know that of your own knowledge?

A. Yes, sir.

20 COURT. Q. Who refused?

A. The charterers; parties we represented in New York.

Mr. COCHRAN. We object, as that is not our act; we ought to have that charter party here to see what that vessel was going to make; the witness can prove the substantive fact that she was not loaded, but anything else we object to.

COURT. If you are going to rely upon the charter party as fixing specifically the amount of your damage you ought to produce it.

Mr. BRYAN. Q. Have you been in the habit of chartering ships?

A. Yes, sir.

Q. That is your business?

A. Yes, sir.

Q. Do you know the charter value in the market of a vessel like the Laurada during November and December, 1895?

A. I can form a fair idea of it.

Q. You are an expert on those subjects?

A. I would not like to say that.

Q. I mean you have a long experience?

A. My experience ought to go for something.

Q. What was her charter value per day?

A. In my opinion she would be worth about $150.00 per day, charter value in the market.

Q. After a charter is broken up by detention and another charter has to be made, how long a time ordinarily does it take to make another charter, reasonable time?

A. You mean the length of time that the vessel would be delayed here by it?

Q. Yes; for instance, if a vessel was given to you to charter, how long a time before the charter usually is completed?

Mr. COCHRAN. It seems to me that that is hardly the right way to prove this matter; we are charged here with detaining the vessel so many days, and if he can prove the charter value per day he has done that, but to prove how long he might take to get another charter party and bring in time beyond that twenty-one days, it does not seem to me that it would be proper; the only thing we are liable for is for the demurrage; that is, the loss of what the ship would probably have earned during those 21 days; this would go to mere speculative damages, and on that ground we object to that question as being too broad.

Cross-examination:

Q. You say the vessel was worth probably $150.00 a day?

A. Yes, sir; I say that is the chartered rate.

21 Q. What do you think they would pay for her time, no expense or anything to come out of that?

A. What she would earn I am figuring on.

Q. Would she earn as much in carrying one kind of cargo as another?

A. I don't think it would depend upon that at all; I think it would depend entirely upon the rate of freight she got. I am basing my figures on what that vessel was chartered for subsequently, and therefore what was market rate at that time. When I say that time, I mean in December, 1895.

Q. You base your opinion, then, upon the character of the freight she was to take?

A. Not at all; I base my opinion upon the market conditions prevailing at that time; the character of the freight I do not consider enters into the case at all; the market rate, because that vessel certainly would take the same proportionate rate taking the different kinds of commodities.

Q. Don't some commodities have a lower freight rate than others?

A. No, sir. You would not take it; you would take the proportionate rate for the time, or go for the freight that pays.

Q. The freight that is charged the shippers is a greater rate than the commodities?

A. Identically; but that does not alter the earning capacity of the ship under the charter's rate.

Redirect:

Mr. BRYAN. Q. How often have you seen the "Laurada" at that time, during 1895? Did you see her often?

A. When you say see, I suppose you mean look at the ship. I very seldom see the ship, in that sense of the word, because my duties do not call me to do that; I look after the business of the vessel, but I can't say that I see her; I handle the vessel.

Q. But you have seen the "Laurada?"

A. Oh, yes, sir.

Q. What kind of ship is she? Merchant ship?

A. I would consider her an ordinary merchant vessel.

Recross by Mr. COCHRAN:

Q. Did you go to the vessel?

A. Went, possibly, about the time she was detained. I don't recollect ever having gone aboard the vessel; no, sir.

Q. Then you don't know anything about the loading or refusing to load, except what others have told you?

A. Yes; because they refused to take the cargo which I had ready; I had the cargo ready.

Q. Did you go down to the ship and see that it was refused?

A. I don't consider that it was necessary for myself, per-
22 sonally; but I considered that my representatives stand for me.

Q. And it is what he told you about it that you made up your mind that the ship would not go off?

A. And the mere fact that my cargo stood on the wharf undelivered.

Q. But you don't know, personally, that your cargo was refused admission into that vessel? Did you see it yourself? Was it not simply told you by others?

A. I know a little better than that; I know the fact that the ship was moved from the Savannah wharf and refused to take my cargo.

Q. Were you there when the refusal was made?

A. Was I up at the Savannah wharf?

Q. Yes.

A. No, sir.

Q. Did you hear anyone on board the vessel say they had refused to take your cargo?

A. The master of the vessel would not let me go on.

Q. But were you there and heard it refused?

A. I don't suppose I was up there at the Savannah wharf; what I know I know from my own representative and from the master of the vessel.

Q. That is what I say—from what they told you?

A. From the master of the vessel; yes, sir.

Redirect by Mr. BRYAN:

Q. You do know that you had the cargo ready for the vessel when she came in here, November, 1895?

A. Yes, sir; and, under agreement, had to get a vessel to carry that cargo.

Q. And you know that by reason of this detention she was not allowed to carry the cargo?

Objected to by Mr. Cochran as leading.

Mr. BRYAN. Q. Did you send that cargo forward by her?

A. I sent that cargo forward by the schooner "David Beard."

Q. As a matter of fact, the steamer "Laurada" did not go forward with the cargo you had for her at the time she came in?

A. At the time; no.

Q. You know that fact?

A. No, sir; she did not.

Mr. Bryan offers in evidence depositions taken in Philadelphia in this case, as follows:

Martin Johansen, taken in 1902.

Mr. Cochran objects to the question: "Did you hear or know at any time that she was a war vessel or that she intended aiding Spain or any other country?"

23 Objection sustained and question ordered stricken out.

Mr. Cochran also objects, on the ground of irrelevancy, to the question: "Did she not carry only a cargo of bananas, oranges, etc., from Kingston to New York?"

Mr. Bryan also introduces the deposition of Phineas E. Thurston, taken in Philadelphia, in 1902.

Mr. Cochran objects to the question: "Did you hear or know at any time that she was a war vessel or expected to make war upon Spain or any other country?"

(Objection sustained and question ordered stricken out).

Mr. Bryan also introduces the deposition of Mrs. Roxana Kerr.

Mr. COCHRAN. We renew our objection to that deposition being introduced in evidence on the grounds that have been previously argued to your honour.

COURT. For reasons already stated, the objection is overruled.

Exception noted by Mr. Cochran to the overruling of the objection.

The court renews its statement that if it should appear in the further progress of the case that there is a material question as to the owner, and that by a cross-examination of this lady on it, facts could be brought out which would be helpful to the Government, the court would feel it its duty to withdraw the case, or else grant the Government a new trial.

In the above deposition Mr. Cochran objects to so much of the question and answer: "Q. What relation did you sustain to the action of Roxana S. Kerr, executrix, v. George D. Bryan, as collector of port of Charleston?—A. I am the plaintiff by substitution, being the widow of William W. Kerr, deceased, originally plaintiff in this case, and am his executrix," as proves the capacity by that method; and further submits that she should prove it by a record.

Mr. Bryan offers the record under the act of Congress of the letters testamentary granted to Roxana S. Kerr.

24 Mr. COCHRAN. This is simply a certificate from the clerk that letters were granted to her, but counsel has here a copy of the original will, which shows that there are no witnesses to that will. I take it one of two things, that either your honour sitting as a federal judge would take judicial notice of what the laws of Pennsylvania required in that respect, and, in the absence of any showing, that your honour would presume that in this State that on matters of general law that the law was the same; or else he ought to show what the law of Pennsylvania is.

Objection overruled, and exception noted by Mr. Cochran.

Mr. Bryan offers in evidence certified copy of the original registry, under the seal of the collector, registry of the steamship "Laurada;" certificate on back is this: "I hereby certify the within to be a true copy of the original of record in this office, given under my hand and seal this 30th day of June, 1902," under the hand and seal of the collector, the original being on record in this office.

Mr. Cochran objects on the ground:

1. That this is a certified copy simply of the license to the vessel, and not accompanied by any certified copy of the original bill of sale.

2. That there is no statute which makes certified copy of this license evidence.

At this point Mr. Bryan introduces certified copy of the bill of sale.

Mr. COCHRAN. The only objection that we have to that is a matter that your honour has already ruled on; we object to that on the ground that it is a copy, secondary evidence, and that the foundation has not been properly laid.

(Objection overruled and exception noted by Mr. Cochran.)

Plaintiff rests.

R. W. HUTSON, sworn.

By Mr. COCHRAN to the court. I don't know that it is necessary under the rules of this court to state that we don't make any motion to direct a verdict now, but after all the evidence is in and matters more clearly presented, I will make the motion, and I don't suppose I waive anything by not making it now.

Q. What position do you hold, if any, under the Federal Government?

A. Clerk of the United States District Court for South Carolina.

Q. As such clerk have you custody of the records of that District Court?

A. I have.

Q. Have you the record in the case of the libel against the steamship "Laurada?"

A. I have it here with me in court.

Q. Is that the record?

A. Yes, sir.

Mr. BRYAN. That record is a record between Kerr and Company and the "Laurada;" it is strictly res inter alios acta, and I object to it as a record, because in that record there are acts may be, statements from third persons, which of course are not evidence in this case.

Mr. COCHRAN. We introduce that record for the purpose of showing that during all the time we had the inspector on board she was in the custody of the marshal.

COURT. We will take the record for that purpose.

Mr. BRYAN. I understand that the record is limited to that purpose only.

Mr. COCHRAN. One other purpose we want to show from this record: that according to the libel proceeding here, and the intervention and all the proceedings, that this vessel was claimed by John D. Hart and Company to be the owners at the time, and the intervenor, William W. Kerr, nowhere in the proceeding made any claim, while he came in and claimed to be the owner that he made no proof of that fact, the libel being dismissed by consent without fixing upon that point.

Mr. BRYAN. The libel of Kerr and Company has nothing to do with this case.

COURT. The record is in for whatever purpose it is competent; you have to call the attention of the court to whatever part of the record you wish the jury to consider as competent evidence, and the court will then pass upon it when it comes up in that shape.

26 Mr. BRYAN. The district attorney having introduced the record, as stated by him for the purpose of proving that the steamship "Laurada" was at the time when she was in the custody of the collector then in custodia legis of the court of admiralty, I object to any part of the record than bearing upon that particular question as to whether the process was good process.

Mr. COCHRAN. To cut the matter short, we simply offer the record in evidence for the purpose of showing the custody of the marshal, and ask to read anything to the jury that bears upon that point; we introduce the record for the purpose of showing that at the time the collector was said to have detained the vessel that the vessel was in the custody of the marshal of the district court, and we shall ask to read from the record any papers which throw any light upon that question. I want to read from the back of the libel in the case called, which shows that the libel under which the proceedings were instituted was marked "Filed November 15, 1895, E. M. Seabrook, clerk district court." We reserve the right to read to the jury, if it becomes necessary, the whole of the monition, dated November 15, 1895. Also reserve the right to show that the stipulation was filed November 15, 1895, stipulation for costs, etc., $250.00.

Mr. Cochran reads to the jury this order: "Ordered, that the marshal release from custody the steamship "Laurada" upon receiving from claimant a bond in the sum of six thousand dollars, with sufficient surety, to be approved by the collector of the port conditioned to answer the decree of this court in this cause," dated December 12, 1895.

Mr. COCHRAN. In pursuance of that order there is a bond marked six thousand dollars, filed December 18, 1895.

Mr. BRYAN. If counsel puts in those excerptions of the papers bearing on that question they ought to put the whole record in.

Mr. Cochran then offers the whole record.

Mr. BRYAN. For a limited purpose only.

COURT. The whole record is in, and if the Government wishes to rely upon any part of that record it shall excerpt that portion and present to the court that part that it wishes to go to the jury, and the court will then rule as to whether it is competent or incompetent.

27 Mr. COCHRAN. If counsel raises the jurisdictional point, we reserve the right to bring in the whole record to prove that point.

Mr. Bryan objects to the introduction of that libel signed by a party on the merits of this case; that is, the ex parte declaration as to any breach of the former charter party. Mr. Bryan again objects to any engagements, charter parties, etc., going to the jury, because it is not a proof of the charter party in another case.

Mr. COCHRAN. We have offered the record for the purpose stated.

V. P. CLAYTON sworn.

By Mr. COCHRAN:

Q. What position, if any, do you hold at present under the Government?

A. Chief deputy United States marshal.

Q. I wish you would look at this book and see if you know where that book belongs, what office it is a record of?

A. This is the Admiralty Docket of the marshal's office.

Q. It is a record of the marshal's office that you found there?

A. Yes, sir.

Cross-examination:

No questions.

PAUL MOORE sworn.

By Mr. COCHRAN:

Q. Where do you live now?

A. Lancaster, S. C.

Q. What is your occupation?

A. Deputy clerk of the court.

Q. What position did you occupy December, 1895?

A. I was clerk in the United State's marshal's office.

Q. Look at page 196 of this book (Admiralty Docket of the marshal's office). Whose handwriting are those entries there, at the first heading, page 196?

A. They are in mine.

Q. Did you make them at the time?

A. Yes, sir.

Q. Were they proper to have them made?

A. Yes, sir.

Q. Just read the entries, please.

Mr. Bryan objects on the ground that the warrant and the return of the marshal on the back of the warrant are the only
28 official entries; that this book kept by the marshal is not proper evidence; that is not the official record.

Mr. COCHRAN. There is nothing in the record to show when he released her, and I want his record there to show when he released her.

To the witness: Read the record there in reference to this particular case.

Mr. BRYAN. A mere entry in a book does not establish the fact how long he did hold possession of the vessel—that is, the actual custody—and if anybody can testify how long he was there, the man who was there, or the marshal himself, that is actual knowledge, and not be proved by an entry in a book.

Mr. COCHRAN. It may be proved if it was an ordinary entry in the course of business.

COURT. I don't know that that is the best evidence. We will take it. Better have the man that was on board.

Witness reads the entries in question, as follows:

"John E. Kerr and John E. Kerr, jr., libellants, vs. The Steamship 'Laurada.' Monition and warrant of arrest. Service by Deputy H. J. Hickson, at Charleston, S. C., Nov. 15, 1895, by posting a copy on the mainmast of said vessel and one on the court-house door and by serving a copy on O. Hoya, first mate of said vessel. E. M. Seabrook, clerk. Wing, Putnam and Burlingham, Trenholm, Rhett and Miller, proctors for libellants. C. B. Simons, guard, 28 days; William Sinkler. guard, 6 days.

Entry	.25
3 services	6.00
34 days custody, at $2.50	85.00
	$91.25

Paid.

Paid $50.00 on acct. by Trenholm, R. and M., June 12, 1897.

Paid $41.25, balance in full, by Trenholm, R. and M., July 20, 1897."

Q. Is there any other entry there made by you as to who the guards were and what days?

A. Yes, sir.

29 Q. What are those entries?

A. C. B. Simons, guard, 28 days; William Sinkler, guard, 6 days.

Q. Do you know whether Mr. Sinkler is alive or not?

A. Well, I don't know.

Q. Who was the first guard?

A. I would say that C. B. Simons was the first guard, he appears first on the book.

Q. And you afterwards put down the other?

A. Yes, sir.

C. B. SIMONS, sworn.

By Mr. COCHRAN:

Q. Where do you live?

A. Dublin, Ga.

Q. What is your occupation now?

A. Cotton business.

Q. Where did you live in 1895?

A. Charleston.

Q. Do you remember when the steamship "Laurada" was in port Charleston in December?

A. Was here from the 15 November, 1895.

Q. Did you have any connection with the detention of the "Laurada?"

A. I was on board in the capacity of a guard.

Q. Guard for whom?
A. United States marshal.
Q. Who employed you to go aboard?
A. United States marshal.
Q. What day did you go on board?
A. November 15.
Q. You made then the seizure?
A. No, sir; Mr. Hickson.
Q. Did you go on there with him?
A. He left me in charge; yes, sir.
Q. He went and made the seizure and left you in charge of the vessel? How long did you stay on the vessel?
A. 28 days.
Q. Did you stay there day and night?
A. Yes, sir.
Q. Who relieved you as guard of the vessel?
A. My impression is that Mr. Sinkler.
Q. Do you know whether Mr. Sinkler is alive or not?
A. I understand he is dead.
Q. When you went on board did the collector of the port have his inspector on board at that time?
A. No, sir; not that I recollect.
Q. Did the collector put his inspector on board after you had taken charge?
A. Yes, sir; that is my recollection.
Q. During the time you were there did the inspector take the vessel away from you?
A. No, sir.
Q. Did he turn you out of the vessel?
A. No, sir.
Q. Did the inspector send you off from the vessel?
A. No, sir.
Q. Did he demand the custody of the vessel from you?
A. No, sir.
Q. He simply was on board there like you were?
A. Yes, sir.
Q. But did not take the vessel away from you?
A. No, sir.

Cross-examination:

Q. Did you take the vessel away from the inspector?
A. No, sir.
Q. Sure of that?
A. Yes, sir.

Redirect by Mr. COCHRAN:

Q. You said there was no inspector there when you and Mr. Hickson took possession?
A. No, sir; no inspector there that I recollect.

Recross:

Mr. BRYAN. Q. But you never turned him off when he got there?
A. No, sir.
Q. Never tried to do that?
A. No, sir.

JOHN P. HUNTER, sworn.

By Mr. COCHRAN:

Q. Where do you live now?
A. Lancaster Court House.
Q. What position do you hold now?
A. Sheriff of Lancaster County.
Q. How long have you been sheriff there?
A. About 20 years; not continuously.
Q. Off and on?
A. Yes, sir.
Q. What position did you hold in 1895?
A. United States marshal for South Carolina.
Q. Did you cause the steamship "Laurada" to be seized when in Charleston?
A. Yes, sir.
Q. Do you remember the time?
A. It was the latter part of 1895; along in November, I think. I forget just the date.
Q. Did you release the vessel before the bond was filed?
A. No, sir.
Q. You released the vessel after the bond was filed?
A. Yes, sir.
Q. You would not have released her at all unless the bond was filed in court?
A. No, sir; without some legal authority.
Q. The time you were in charge of it, was that possession taken away from you by the collector?
A. No, sir.
Q. Was any complaint made to you?
A. None at all.
31 Q. Was it interfered with by the collector?
A. Not at all; the collector had a talk with me about putting a man on with my guard, and I think I told him it was all right; he did not state his reasons for it or anything of that sort.
Q. Said he would like to put a man on with your guard?
A. Yes; said he thought it would be pleasant for him.
Q. And you permitted him?
A. Yes, sir.

Cross-examination:

Q. When the collector took possession, or his representative, did you refuse to do so?
A. The collector did not take possession.

Q. Did not he have his inspector aboard?
A. He had a man on there, put a man on there with my guard, but he did not take possession.
Q. You did not turn him out?
A. No, sir.

Redirect by Mr. COCHRAN:

Q. Did you know Mr. Hickson?
A. Yes, sir.
Q. The deputy marshal?
A. Yes, sir.
Q. Is he alive or not?
A. No, sir; he is dead.

December 10, 1907.

Mr. Cochran calls attention of the court to the fact that some of the papers of the record which was introduced in evidence yesterday are missing today, and it may be that he will need them in discussing the question of jurisdiction.

GEORGE D. BRYAN, sworn.

By Mr COCHRAN:

Q. Where do you live now?
A. In Charleston.
Q. What position do you hold now, if any?
A. I am judge of probate for Charleston County.
Q. What position did you hold in November, 1895?
A. I was collector of customs of the port of Charleston, under Mr. Cleveland's administration.
Q. Did you receive any instructions at that time with reference to the "Laurada?"
A. I did.
Q. From the department?
A. Secretary of the Treasury of the United States.

Q. Look at those two telegrams there and see if those are
32 the telegrams that you received?

A. Yes; I received those telegrams.

Mr. BRYAN. We object to the competency of any communication that went from the Secretary of the Treasury to the collector of the port bearing upon the merits of this case, any declaration or any communication or any statement made, as hearsay, except as it bears upon the fact that the act was done under the order of a superior officer, which would come under the section 989, which relieves the collector of the personal liability. These declarations are wholly hearsay, and we have no right of cross-examination.

Mr. COCHRAN. We shall not introduce the declarations there as evidence of those facts which are charged, but we introduce them for the purpose of showing his authority to make the seizure.

These two telegrams are offered in evidence by Mr. Cochran, and are as follows:

"78 A. F. C. F. 76 paid Govt. 4:35 p. m.

WASHINGTON, D. C., *Nov. 15.*

Collector Customs, Charleston, S. C.:

Secretary State requests this department to take such instant and appropriate action as is necessary to vindicate the neutrality laws in the case of the steamer "Laurada," supposed to have landed a hostile expedition from the United States in Cuba. If the vessel arrives in your district you will please take measures for her detention and report acts to this department without delay; consult United States Attorney.

C. S. HAMLIN, *Actg. Secy.*"

"51 A. C. M. A. D. 50 paid Govt. 2:49 p. Nov. 16.

WASHINGTON, D. C., 16.

Collector Customs, Charleston, S. C.:

Referring to telegram yesterday relative to steamer "Laurada" collector customs, Philadelphia, states that he advised by Maritime Exchange that she has just arrived at your port. Take measures as directed in yesterday's telegram for detention vessel and report by telegraph.

C. S. HAMLIN, *Acting Secretary.*"

35 Mr. COCHRAN. Q. The first of the telegrams is dated the 15 and the next one is the 16?

A. First telegram is dated 15 November, 1895; second telegram is on the day following, 16 November, 1895.

Q. State what you did pursuant to those instructions.

A. Well, I am not permitted to read the telegrams; it is very hard for me to testify without saying what the telegram said.

Q. You might tell what you did.

A. This telegram instructed me to take measures for the detention of the "Laurada" and to consult with the United States attorney, who at that time was Mr. Perry Murphy. Immediately upon receipt of this telegram on the 15 November I consulted Mr. Perry Murphy, who at that time had his office in the United States customs house. Court was located there, it was convenient, and I took the telegram and went to him and consulted with him, and he advised me to put an inspector aboard the "Laurada," which I did.

Q. Who had charge of the "Laurada" at that time?

Mr. Bryan objects to the question as being a matter of law.

WITNESS. A. It was reported to me in my official capacity as the collector of customs that the United States marshal was in possession of her when my inspector went aboard.

Mr. Bryan objects to any hearsay testimony on that subject, as a matter of record and of law.

Mr. COCHRAN. Q. Did you consult with the marshal about the matter?

A. I did.

Q. What passed between you and the marshal?

Mr. Bryan objects also to anything that passed between the marshal, or to any conversation between the marshal and the collector about that subject.

Mr. COCHRAN. That would be competent because that would tend to show the nature of his possession.

Mr. BRYAN. Any conversations between the marshal and the collector are incompetent as not brought to our attention, and, in addition to that, we have your own correspondence here when this vessel was seized, and the collector replied that he would not let her
34 proceed, and there is the record. Conversations between other parties not brought to our attention are wholly irrelevant to disturb that effect.

COURT. Note the objection and take the testimony.

Exception noted by Mr. Bryan to the testimony.

Mr. COCHRAN. Q. What conversation did you have with the marshal about putting an inspector on board?

A. As soon as it was reported to me that the marshal was in charge, and was in charge when the customs inspector went aboard, I saw Mr. Hunter and told him the situation, and he said yes, he was in charge; and I said then: "Have you any objection to my inspector remaining?" and he said, "None whatever, Mr. Bryan;" and I went on further, and I said to Mr. Hunter: "Will you be kind enough to let me know as soon as an order for the release of the 'Laurada' is filed in your office?" and I did it for this reason, if you wish to know it: I knew that I could not oust the United States district court of its jurisdiction and set aside its possession, and I wanted to know; there were instructions from the department to detain her; then if that order was filed, I did not know when it would be filed, might be filed at night, might go off surreptitiously; I wanted to know so that I could continue. They took the vessel legally in possession, that is all the case.

Q. Did you withdraw your inspector?

A. I did.

Q. Did you withdraw your inspector before the marshal gave up the custody of the ship?

A. I did.

Q. Did you take the vessel away from the marshal at all in any way, shape, or form?

A. I did not at all; could not do it.

Q. Did you disturb the marshal at all?

A. I did not. I think it very well for it to come out; in consultation with Mr. Murphy, as I was instructed to do by the Government, we came to the conclusion that there was no evidence that we could get to convict this vessel, and I wrote to the department, told them exactly the state of affairs, and they instructed me to take my in-

spector off, and I took the inspector off on the 6th of December, and the marshal released the vessel on the 18 of December.

Q. Is there anything further that you care to say about it?

A. No; I don't think so. I think that is about the case in a nutshell, so far as I am concerned. I acted under instructions from the Government in putting the inspector on, and the marshal was in charge at that time.

Mr. BRYAN. We again move to strike out the answer that the
35 marshal was in charge, and to strike out all the testimony as to the conversations between the marshal and the collector, as not being communicated by the defendants and their counsel, and irrelevant and incompetent.

Mr. COCHRAN. We offer it only for the purpose of showing the nature of the possession of the marshal or collector, as the case might be, and not for any other purpose.

Q. You may state why you wrote that second letter to Senator Butler, letter dated December 6, 1895; take the letter and make any explanation or statement that you care to make about it.

A. This letter to General Butler of Nov. 20, reads as follows:

"Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I am 'detaining the steamer "Laurada" on behalf of the United States.' I could not permit her to proceed as indicated in your letter, as my instructions are to detain her."

Mr. Bryan objects to the statement that plaintiffs knew that she must have been in possession of the United States marshal.

WITNESS. It is unnecessary for me to say here that I did not think it was any part of my duty to inform the plaintiff's counsel as to what my business was; I had my instructions from the department, and it was no duty to give my business away to the public or to anybody else. This letter of December 6 was written as a matter of courtesy; as soon as I withdrew the inspector from the "Laurada" I wrote him this letter: "I beg to inform you that under instructions from the Government I have to-day withdrawn my inspector from the 'Laurada' and she is free, so far as this office is concerned." She was then still in the possession of the United States marshal.

Q. Did you mean by any of those letters to say that you had possession of that vessel?

A. No; I did not.

Mr. Bryan objects on the ground that the letters speak for themselves.

COURT. I think it competent for him to state any conversations with General Butler as tending to show that Gen. Butler as representing the ship, was aware of the fact that the ship was being detained by the United States marshal, but his interpretation of what he meant by the letters I don't think is competent.

Mr. COCHRAN. Q. Did you have any conversation with Gen. Butler?

A. None whatever.

36 Cross-examination:

No questions.

CHARLES RASMUSSEN (direct).

By Mr. COCHRAN:

Q. Where do you live?

A. Baltimore, Md.

Q. Did you have any connection with the "Laurada?"

A. Yes, sir.

Q. Do you remember when the "Laurada" was in the port of Charleston here in 1895?

A. In the latter part of the year; November, I think it was.

Q. What connection did you have with the "Laurada" at that time?

A. I was seaman aboard her.

Q. How long had you been aboard of her?

A. About five months.

Q. Were you aboard of the "Laurada" when she left New York for Cuba?

A. Yes, sir.

Q. That same fall?

A. Yes, sir.

Q. Do you remember the month?

A. About October.

Q. When she left New York who was captain?

A. Captain Hughes.

Q. Where was she going? What was her destination?

A. Jamaica.

Q. Did she have any cargo when she left New York?

A. None, sir.

Q. None?

A. No, sir.

Q. After she left New York did she take aboard anything?

A. Yes.

Mr. BRYAN. The condition of the "Laurada" when in Charleston at the time she was seized is the condition alleged in this answer; anything as to the "Laurada" other than her condition at the time she was in Charleston has nothing to do with this question; the answer is that she was here with arms and men in Charleston; what she had on some previous occasion has nothing to do with this issue.

COURT. The court will admit the testimony. It is doubtful whether it is competent, very doubtful, and the court will admit it, because this case may go beyond this court, and the Government would be entitled to have the whole case, as it views it, brought out; it will admit the testimony, and if it comes to the point it will charge the jury whatever there were of suspicious circumstances in the "Laurada"—and there were a great many—that would have justified

37 the detention of the ship, the court will say then that if it should come to that point, but there were circumstances of grave suspicion in the conduct of the "Laurada," within the knowledge of the court. It looks as if the court were testifying, but this case has been so often before it that it ought to know a great deal about it. There was on the voyage preceding it what in the opinion of the court was a military expedition to the island of Cuba, and she could have been arrested at that time, and undoubtedly legally detained if she could have been seized. At the time she was detained here there was nothing in her conduct that in view of the court would justify her detention, but the Government is entitled to make out its case as best it can, for other courts may take a different view of the law from that I take.

By Mr. COCHRAN:

Q. Did she take on anything after she left New York City?
A. Yes, sir.
Q. Whereabouts was that?
A. Outside of Sandy Hook.
Q. About how far from New York City?
A. About fifteen miles.
Q. How were the things conveyed to her?
A. By two tugboats.
Q. What was it that she took on out there?
A. She took about 40 men and a whole lot of boxes and stuff, and three boats.
Q. What were in the boxes?
A. Ammunition.
Q. Did you say two or three boats?
A. Three boats.
Q. What kind of men were they?
A. Different kinds.
Q. What nationalities, these 40 men?
A. I think most of them was Cubans, but there was other nationalities among them, too.
Q. Did they have anyone in command of them?
A. Yes, sir.
Q. An officer?
A. Yes, sir.
Q. Military?
A. Yes, sir.
Q. Did these 40 men have anything to do with navigating the ship?
A. No, sir.
Q. They did not?
A. No, sir.
Q. Was there any drilling aboard the ship before you got to Cuba?
A. Yes, sir.
Q. After the ship left with these men, where did she go to? Did she go to Jamaica first?

A. No, sir; went to Cuba first.

Q. What happened as they approached the coast of Cuba? What did the captain do or say?

A. Slowed the vessel down so as to get in at night.

Q. What was done after you got down to the coast of Cuba?

A. Well, all the lights were put out at night.

38 Q. What part of the coast of Cuba, do you recollect?

A. On the southern coast.

Q. Near what point, if any?

A. Near Cape Mazi.

Q. What was done then with the men and the ammunition and the boats, if anything?

A. The men and the ammunition was all put in these boats and put ashore.

Q. What did the "Laurada" do after that?

A. Went down to Jamaica.

Q. What became of the three boats?

A. I know we did not see them after they left the ship.

Q. Did they take any of the ship's boats with them?

A. Yes, sir.

Q. How did that happen?

A. Well, the three boats they had would not hold all the men and the ammunition, and they got one of the ship's boats.

Q. Did the ship get that boat back?

A. No, sir; not while I was on it.

Q. Who was the owner of that vessel?

A. I understand Mr. Hart was the owner.

Objected to by Mr. Bryan as incompetent. Objection sustained.

Mr. COCHRAN. Q. The captain on this voyage down to Cuba was Captain Hughes?

A. Yes, sir.

Q. After the boat left the island of Cuba where did she go?

A. To Jamaica.

Q. What happened to the boat there, if anything?

A. Nothing; we loaded a cargo of fruit.

Mr. COCHRAN to the COURT. I don't want to transgress the rules. Would it be competent for me to show any trouble with the authorities there, any seizure there, if any?

COURT. In Jamaica?

Mr. COCHRAN. Yes.

COURT. I don't think so.

Mr. COCHRAN. Q. She left there with a cargo of fruit. Where did she go from there?

A. New York.

Q. What happened in New York? Did she discharge the cargo there?

A. Yes, sir.

Q. What was the home port of this vessel?

A. Philadelphia.

39 Q. Do you remember about the time she got back to New York how long was it before she came down to Charleston?

A. Four days.

Q. When she left New York what did she have then?

A. Nothing.

Q. Nothing aboard her?

A. No.

Q. What did she do then? Who was still captain?

A. Captain Hughes.

Q. He still remained in charge?

A. Yes, sir.

Q. What did he do with the vessel after she discharged that cargo in New York?

A. Came down here to Charleston.

Q. Did he go anywhere else or steer anywhere else?

A. No, sir; did not go anywhere else; he wanted to go into Hampton Roads.

Q. Do you know why they did not go into Hampton Roads?

A. No; I do not.

Q. Wanted to go into Hampton Roads, but did not?

A. Yes, sir.

Q. Do you know whether they tried to put into Wilmington or not?

A. No.

Q. When she came down here to Charleston what happened then?

A. As soon as we got in here the marshal came aboard and seized her.

Q. Was Capt. Hughes aboard of the vessel the whole time from the time she left New York the first time, rounded to Cuba and Jamaica, back to New York, and down to Charleston?

A. Yes, sir.

Mr. BRYAN. Renewing our objection to the testimony as incompetent and irrelevant to the issues here, we have no question to ask the witness.

Defendant closes.

JULIUS SEABROOK sworn.

By Mr. BRYAN:

Q. (Handing the witness the monition in the case of John E. Kerr and Company vs. The Steamer "Laurada," dated 15 November, 1895.) Will you look at the writing at the bottom of that monition "E. M. Seabrook, C. D. C. U. S. S. C., per Julius Seabrook, deputy clerk;" will you say in whose handwriting that is?

A. That is in the handwriting of my brother, J. D. Seabrook.

Mr. COCHRAN. We object, as the paper has the seal of the court, filed with the record, and a part of the record, and we submit that it can not be attacked in that way.

40 Objection overruled and exception noted by Mr. Cochran.

Mr. BRYAN. Q. Whose handwriting is it?

A. I recognize it as the handwriting of J. D. Seabrook, my brother.

Q. Do you call yourself Mr. Julius Seabrook now?

A. I did not write it.

Objected to by Mr. Cochran. Objection overruled and exception noted.

Mr. BRYAN. Q. At that time where was Mr. E. M. Seabrook, clerk of the United States District Court, on the 15 November, 1895?

A. He was out of the district, in Atlanta, Ga.

Q. What was his condition?

A. He was sick at the time.

Q. How soon after that did he die?

A. About within the next ten days.

Q. Where were you, you Julius Seabrook, deputy clerk, where were you on the 15 November, 1895?

A. I was not in Charleston, and my recollection is that I was in Atlanta.

Q. With your sick father?

A. Yes, sir.

Q. What was your brother's occupation at that time?

A. As I remember, he had been engaged in rock mining shortly previous to that time, and as I remember it, he was still engaged in rock mining at that time.

Q. How did he come to go into the office at that time?

A. I was called off in the emergency of my father's sickness, and expected to be absent.

Mr. COCHRAN. We object to all of this testimony, on the ground that this record can not now in a suit between other parties be attacked collaterally in that way; it is regular on its face.

Mr. BRYAN. Q. During this emergency you asked him to go in and look after the office for you?

A. I asked him to take charge of the office for a few days during my absence, and to file any papers that came in.

Cross-examination:

Q. He had authority to sign your name for you? You told him to sign your name?

A. I told him to mark any papers filed; that is my recollection; I told him to receive and mark filed any papers that came in, and if it was necessary to issue any writs, subpœnas or writs, to sign the clerk's name to them.

41 Q. You told him that?

A. I told him that; there was very little going on at the time, it was in the fall, and I counted on nothing turning up during my absence; I would not be absent more than a few days.

Q. Your brother was not a deputy?

A. I was the deputy clerk of the office at that time, was the regular deputy of the office, and had been deputy for some years previously.

Q. Is that the seal of the court there?

A. It is very indistinct, but I have no doubt it is; I recognize it as the seal.

Q. When you came back you made no objection to what your brother had done, did you?

A. No; I made no objection.

Q. You filed the paper as the record of your court?

A. Yes, sir.

Q. And the marshal or his deputy marshal made his return?

A. Yes, sir.

J. P. K. BRYAN, Esq., being duly sworn, states as follows: I desire to state to the court that I was one of the counsel for the "Laurada" with Gen. Butler at the time she was in the possession, under these letters detained, by the collector of customs. Letter of November 20, 1895, of Gen. Butler to the collector was written under these circumstances: The parties were here and were ready to give bond for the vessel.

Mr. COCHRAN: We object to that. If they were ready to give bond, it was their duty to do so; if they had done that, we would be ready to throw up the case.

Mr. BRYAN. We desired to know if the United States collector was detaining the vessel.

Mr. COCHRAN. The counsel has made the point himself that all letters speak for themselves, and as to his readiness to give bond it should be testified to the fact as to what they did do.

Mr. BRYAN. We were ready to give bond, but the giving of it was useless.

COURT. You did not do it.

Mr. BRYAN. We did not give it because the collector said we would not be allowed possession.

Mr. COCHRAN. We object to that and move that it be stricken from the record.

42 Objection sustained and the answer ordered stricken from the record.

By Mr. COCHRAN:

Q. In the Admiralty case you represented Capt. Hughes, did you not?

A. Yes, sir.

A. As on the part of William W. Kerr?

A. Yes, sir.

Q. Was any question raised as far as the pleadings goes about this want of a seal there, about the signature of the clerk?

A. Yes, sir.

Q. Where is it in the record?

A. I think his oral statement was taken before the judge, as I remember it.

Q. Was not that a consent order?

A. The record speaks for itself.

Q. But you did not in your pleadings or anywhere in your pleadings make any point or any question, as far as the pleadings go, of this signature by the clerk?

A. I think the question was made on the ground of the jurisdiction of the court.

Q. I want to ask you if you put it down in any of the pleadings?

A. The record speaks for itself; I don't think there was any record pleading.

Q. As a matter of fact, you took interrogatories on all the facts of the libel, did not you?

A. I don't remember them.

Q. Do you know where those interrogatories are?

A. I do not.

Q. They are not in the record now?

A. I do not know; the custody of the record is with the clerk.

Plaintiffs close.

United States of America, District South Carolina, Circuit Court, Fourth Circuit.

ROXANA KER, AS EXECUTRIX OF WILLIAM W. KER, DECEASED, A citizen of the State of Pennsylvania, plaintiff,
against
GEORGE D. BRYAN, A CITIZEN OF THE STATE OF SOUTH CAROLINA, as collector of the port of Charleston, defendant.

Deposition of Martin Johansen.

Depositions of sundry witnesses taken before me, a notary public for the Commonwealth of Pennsylvania, residing in the city of
43 Philadelphia, pursuant to the notice hereto attached, and at the time and place mentioned therein, to be read as evidence in behalf of the plaintiff on the trial of the aforesaid cause.

Present: J. Joseph Murphy, Esq., on behalf of the plaintiff; Algernon B. Roberts, Esq., Assistant United States Attorney for the eastern district of Pennsylvania, on behalf of the collector.

MARTIN JOHANSEN, being by me first duly sworn, as hereinafter certified, deposes and says, as follows:

Examined by Mr. MURPHY:

Q. What is your name, age, and present occupation?

A. Martin Jonhansen; 34 years of age; Rigger.

Q. Where do you reside?

A. 364 Winton street, Philadelphia.

Q. Were you on board the steamer "Laurada" in Charleston when seized in the fall of 1896?

A. Yes, sir.

Q. In what position?

A. Second officer.

Q. How long had you been on the steamer?
A. About three years.
Q. Where did the steamer come from when she came to Charleston?
A. New York.
Q. What was her cargo, if any?
A. None. Ballast.
Q. From what port did she last bring her cargo?
A. From Jamaica, W. I.
Q. Did she have any guns on board, or cannons?
A. No, sir.
Q. Was she a merchant vessel or warship?
A. She was a merchant vessel.
Q. Were there any soldiers aboard her while in Charleston?
A. No, sir.
Q. Did she have any munitions of war upon her while in Charleston, or on her way to Charleston?
A. No, sir.
Q. If you know, state what she came for?
A. A cargo of pyrites.
Q. Did she commence to load in Charleston, when she was seized?
A. No, sir.
Q. What was in her hold?
A. Nothing.
Q. Were they not empty?
A. Yes, sir.
Q. How long a time was she in the custody of the Government?
A. About three months, I think.
Q. Do you know what cargo she took?
A. Pyrites.
Q. Did she not come to Philadelphia?
A. No; to Perth Amboy.
44 Q. Did you hear or know at any time that she was a war vessel, or that she intended aiding Spain or any other country?
Objected to by Mr. Roberts.
A. No, sir.
Q. Did you see any signs of war on board?
A. No, sir.
Q. Was she not a merchant vessel?
A. Yes, sir.
Q. Did she not carry only a cargo of bananas, oranges, etc., from Kingston to New York?
Objected to by Mr. Roberts.
A. Yes, sir.
Q. Did she not go from New York to Charleston frequently?
A. Yes, sir.
Q. Was she not safely in the port of Charleston when seized?
A. Yes, sir.
Q. Was not her crew ordinary sailors and her captain the captain that had been her master for several months?
A. Yes, sir.

Q. What was the number of her crew?
A. About twenty-one.
Q. How many officers?
A Two, and the captain.

Cross-examined by Mr. ROBERTS:

Q. You said this alleged seizure took place, when?
A. I can't remember the dates.
Q. Don't you remember whether it was in '96 or '97?
A. In '96.
Q. And at that time you had been in charge as second mate for three years?
A. Yes, sir.
Q. As second mate, what were your duties?
A. To keep the captain's watch, to look after the men—keep them working—and to look after the ship in general.
Q. In other words, you aided in the navigation of the ship?
A. Yes, sir.
Q. And where did the ship come from previous to her arrival at Charleston?
A. From Kingston, Jamaica.
Q. And where did she come from previous to her arrival at Kingston?
A. From New York.
Q. Were you on board her at the port of New York?
A. Yes, sir.
Q. In the position of second mate?
A. Yes, sir.
45 Q. How long was she in the port of New York?
A. I think, about forty-eight hours.
Q. Where had she been previous to her arrival at the port of New York?
A. Kingston, Jamaica.
Q. In other words, she made trips from Kingston, Jamaica, to New York and returned, and she remained in New York forty-eight hours?
A. Yes, sir.
Q. Were you on board continually the forty-eight hours while she was in New York?
A. Most of the time.
Q. How much of the time?
A. All but about a couple of hours.
Q. In other words, you were on board the entire time, except a couple of hours?
A. Yes, sir.
Q. What kind of a cargo did she take from New York?
A. None. She had ballast.
Q. Did you see them loading the ballast?
A. It was water ballast.

Q. When the ship loaded her cargo, was it done under your special supervision?

A. No, sir.

Q. So you did not have charge of loading the cargo?

A. No, sir.

Q. So you had nothing to do with that?

A. No, sir.

Q. So you did not know anything but what was told you?

A. No, sir.

Q. So all your knowledge is only what was told you?

A. And what I saw myself.

Q. In other words, you did not have charge of loading the ship's cargo? Who had charge?

A. The stevedores.

Q. Who had charge of them?

A. They were employed by the company.

Q. Who owned that boat?

A. The company it ran for.

Q. You say that boat went on a trip from New York to Jamaica and she took on a cargo at Jamaica?

A. Yes, sir.

Q. Did you have charge of the loading of that cargo?

A. No, sir.

Q. So all you know about the cargo is what was told you?

A. Yes, sir.

Q. Is it not true that she was libeled by the United States marshal while in Charleston?

A. Yes, sir.

Q. And that the collector of the port who detained the vessel did so after the marshal had taken charge?

A. That I could not tell. She was libelled by the United States marshal.

Q. Is it not true that as soon as she was released from that libel, that the collector of port also released her and permitted her to go?

A. Yes, sir.

46 Q. In other words, she was not detained after the United States marshal had released her from the libel?

A. No, sir.

Q. Did you ever, while lying in the harbor, go down in the hold of that vessel and make a thorough examination of it?

A. Yes; often.

Q. A careful examination?

A. Working around, cleaning, and scraping; cleaning the hold.

Q. Were you on board of her continually during her stay at Charleston?

A. Yes, sir.

Q. Did not go ashore?

A. Went ashore once in a while in the evenings.

Q. Who was her captain?

A. Captain Hughes.

Q. Who engaged the crew?
A. Captain Hughes.
Q. You had nothing to do with engaging the crew?
A. No, sir.
Q. So you don't know whether they were soldiers, or what they were?
A. They wore civilian's clothes.
Q. For all you know, the crew might have been soldiers, or filibuters, or anything else?
A. I don't know anything about that.
Q. You did not engage the crew, and you know nothing about it, other than the fact that you saw these men on board the vessel?
A. No, sir.
Q. Was there any cargo taken on at Charleston?
A. No, sir.
Q. You did not see any cargo?
A. No, sir.

MARTIN JOHANSEN.

Sworn & subscribed before me this 9th day of May, A. D. 1902.
[Notarial seal.] MARK D. JONES,
Notary Public.

Commission expires Jany. 29th, 1905.

Deposition of Phineas E. Thurston.

PHINEAS E. THURSTON, being by me first duly sworn, as hereinafter certified, deposes and says, as follows:

Examined by Mr. MURPHY:

Q. What is your name, age, and present occupation?
A. Phineas E. Thurston; 53 years; chief engineer Phila. & Reading R. R.
Q. What is your address?
A. 2426 E. Cumberland street, Philadelphia.
47 Q. Were you on board the steamship "Laurada" in Charleston, when seized by the United States in the fall of 1896?
Question objected to by Mr. Roberts.
A. Yes, sir; I was on board.
Q. What was your position on the steamer?
A. Chief engineer.
Q. How long had you been on the steamer?
A. Possibly about a year (somewhere in that neighborhood).
Q. Where did the steamer come from when she came to Charleston?
A. Brooklyn.
Q. What was her cargo, if any?
A. No cargo.
Q. From what port did she last bring her cargo, and what was the cargo?

Question objected to by Mr. Roberts.

A. Jamaica; fruit, mostly oranges.

Q. Was she a merchant vessel or a warship?

A. Merchant vessel.

Q. Did she have any guns or cannons aboard?

A. No, sir.

Q. Were there any soldiers aboard her while at Charleston, at any time?

A. No, sir.

Q. Did she have any munitions of war aboard while in Charleston or on her way to New York from Charleston?

A. None.

Q. If you know, state what she came to Charleston for?

A. After a cargo of rock, used for fertilizing.

Q. Did she commence to load in Charleston, when seized?

A. She had not commenced. She was in the berth but had not commenced to load.

Q. What was in her holds when she was seized?

A. Holds were empty. Nothing that I know of.

Q. Were they not empty?

A. Yes, sir.

Q. How long a time was she in the custody of the Government?

A. In the neighborhood of 21 to 25 days.

Q. Do you know what cargo she took from Charleston?

A. She took this rock.

Q. Was it not pyrites?

Question objected to by Mr. Roberts.

A. That may be the name of it; I call it rock. Rock is not the proper name of it.

48 Q. Did she not come to Philadelphia from Charleston?

A. No; she went back to Staten Island, on the Jersey side.

Q. Did you hear or know at any time that she was a war vessel, or expected to make war upon Spain or any other country?

Question objected to by Mr. Roberts.

A. No, sir.

Q. Did you see any signs or preparations for war on board?

A. No, sir.

Q. Was she not a merchant vessel?

A. She was a merchant vessel.

Q. Did she not carry a cargo of fruit—bananas, and oranges from Kingston, Jamaica, to New York?

A. That was all.

Q. Did she not come from New York to Charleston empty?

A. Yes, sir.

Q. Was she not empty in the port of Charleston when seized?

A. Yes, sir.

Q. Was not her crew ordinary sailors, and her captain the captain that had been her master for several months?

A. Yes, sir.

Q. What was the number of her crew?

A. Twenty-two or 23.
Q. How many officers?
A. Five.

Cross-examined by Mr. ROBERTS:

Q. When did this alleged seizure by the collector of which you speak take place?
A. I don't know.
Q. How do you know it did take place?
A. Because I was there in Charleston when the boat was seized.
Q. And you don't remember when?
A. No.
Q. Can't you tell us about when it was?
A. I never bothered my head about it since.
Q. Can't you tell us what year?
A. About two years ago.
Q. Isn't is so that at the time she was seized she was libeled by a United States Marshal in Charleston?
A. Yes, sir.
Q. Isn't it also true that when the United States Marshal released her that the collector did so at the same time?
A. I could not tell about that. I was not interested in that. All I know is that she was released.
49 Q. How do you know that she was seized?
A. The custom officer was aboard and the notice was put up that she was seized.
Q. Wasn't the officer on board her by order of the United States marshal?
A. Yes, sir.
Q. Have you any personal knowledge as to whether the collector of the port of Charleston seized that boat?
A. No; I know that she was seized by the Government and by the authorities of Charleston—the United States collector.
Q. Do you know whether the United States collector seized her or not, of your own knowledge?
A. Yes; I do.
Q. How do you know that?
A. Because I saw him aboard; the notice was signed by the United States collector.
Q. Sure it was not the marshal?
A. I could not tell you whether it was the marshal or the collector that seized the boat. I know that she was seized.
Q. But you do not know by whom?
A. No, sir.
Q. Your duties were those of engineer on that boat at that time?
A. Yes, sir.
Q. Did you have anything to do with loading or unloading the cargo?
A. Supplied the power to load it.
Q. Did you have anything to do with loading the cargo itself?

A. Nothing more than I have said.

Q. Did you see any cargo being loaded or unloaded?

A. I saw the cargo going into her at Charleston, after she was free from being seized.

Q. But when she is being loaded your station is in the engine room?

A. No; all around the ship.

Q. Is it not your duty to inspect the cargo?

A. No, sir.

Q. Is it your duty to inspect the hold of the vessel?

A. Yes, sir.

Q. How often do you make such an inspection?

A. Once every day.

Q. For what purpose?

A. To see whether there is any leakage.

Q. But you don't examine minutely into the cargo itself, do you?

A. No, sir.

Q. Were you on the boat continuously all the time she was at Charleston?

A. I went ashore.

Q. Part of the time you were on shore?

A. Possibly, part of the time.

Q. But part of the time you were on shore?

A. Occasionally.

Q. Therefore, articles or cargo could have been put on the boat without your knowledge while she was in Charleston?

A. Cargo could not.

50 Q. Articles could have been?

A. Articles could have been put aboard her.

Q. Without your knowledge?

A. Yes, sir.

Q. Did you have anything to do with engaging the crew?

A. In the engineer's department.

Q. You knew nothing about the rest of the crew?

A. Only seeing the men.

Q. But you don't engage them?

A. No.

Q. You don't know whether they were soldiers or not?

A. I know they were not.

Q. How do you know?

A. They were seafaring men.

Q. You don't know whether their purpose was to become soldiers or not?

A. Never saw any signs of same.

Q. All your knowledge in regard to the crew was confined to the engineer's department?

A. Only one in charge.

Q. How many men did you engage in that department?

A. About eight.

Q. What was the total number of her crew?

A. 22 or 23.

Q. Is it not true that this boat was seized at Wilmington, Del., a short time before her trip to Charleston, on account of the charge of filibustering?

A. No.

Q. Was she ever seized for filibustering while you were connected with her, before this trip to Charleston?

A. No.

Q. Never?

A. No.

Q. If I understand you correctly, you said she sailed from the port of New York to Charleston?

A. Yes, sir.

Q. Did you have anything to do with the loading of the cargo at Brooklyn?

A. No cargo loaded at Brooklyn.

Q. Were you on board of her continuously while she was at Brooklyn?

A. Possibly away an hour or two at a time.

Q. How long did she lay in the port of Brooklyn before she sailed for Charleston?

A. Nearly one day.

Q. And where had she come from before she landed at Brooklyn?

A. From Jamacia.

Q. The owners of the boat directed what cargo the boat should carry, did they not?

A. Yes, sir.

Q. And do they inform you as to what the cargo will be?

A. Generally they do.

Q. Did they inform you what kind of cargo they expected to carry from Charleston?

A. Yes; directly.

Q. Who did you get that information from?

A. Mr. Hart, the owner.

Q. What did he inform you the cargo was to be?

A. Rock.

Q. When did you leave the service of that boat?

A. I left at Wilmington, Del., about two and a half years ago.

51 Q. Did she go there directly from Charleston?

A. No; from Port Antonia.

Q. The fact is your recollection is a bit hazy about this?

A. As to dates it is; I recollect the circumstances.

PHINEAS E. THURSTON.

Sworn and subscribed before me this 23rd day of May, A. D. 1902.

[Notarial seal.] MARK D. JONES,
Notary Public.

Commission expires January 29th, 1905.

United States of America, District of South Carolina, in the Circuit Court.

ROXANA S. KER, EXECUTRIX, PLAINTIFF,
vs.
GEORGE D. BRYAN, AS COLLECTOR PORT OF CHARLESTON.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

The examination of witness de bene esse being on the sixth day of December, 1907, on behalf of the plaintiff, before me, Augustine C. Metzinger, notary public, at my office 14 South Broad street, Philadelphia, Pa., in certain suit now pending in the Circuit Court of the United States for the District of South Carolina, wherein Roxana S. Ker is plaintiff and George D. Bryan, collector of the port of Charleston, is defendant. Roxana S. Ker, witness produced on behalf of the plaintiff, being first duly sworn, deposes and says:

Present: William W. Lucas, esq., attorney for plaintiff; Roxana S. Ker, plaintiff.

ROXANA S. KER, being duly sworn, testifies as follows:

By Mr. LUCAS:

Q. What is your name?

A. Roxana S. Ker.

Q. Where do you live and what is your age?

A. I live at 600 North Thirteen*th* street, Philadelphia, Pa. I am 58 years of age.

Q. What relation did you sustain to the action of Roxana S. Ker, executrix, vs. George D. Bryan, as collector of port of
52 Charleston?

A. I am the plaintiff by substitution, being the widow of William W. Ker, deceased, originally plaintiff in this case, and am his executrix.

Q. Did you have the papers of W. W. Ker in your possession?

A. I did and now have them.

Q. Did you diligently search for the original bill of sale of the steamship "Laurada" by John D. Hart to W. W. Ker dated January 24th, 1895?

A. I have. I have never seen it and have never had it in my possession at any time, nor have I been able to find the register of the steamship "Laurada" dated January 27th, 1895, nor have I ever had it in my possession.

Q. When did Mr. Ker die?

A. January 31st, 1901.

ROXANA S. KER.

Sworn to and subscribed before me this 6th day of December, A. D. 1907.

[Notarial seal.] AUGUSTINE C. METZINGER,
Notary Public.

Commission expires Jan. 15th, 1909.

EXHIBITS IN EVIDENCE.

Libel.

District Court of the United States, Eastern District of South Carolina.

JOHN E. KERR AND JOHN E. KERR, JUNIOR, CO-PARTNERS, as John E. Kerr & Company,
against
THE STEAMSHIP "LAURADA," HER ENGINES, ETC., AND against Samuel Hughes, master.

To the Honorable WILLIAM H. BRAWLEY,
Judge of the District Court of the United States for the Eastern District of South Carolina:

The libel and complaint of John E. Ker and John E. Ker, junior, composing the firm of J. E. Kerr & Company, against the steamship "Laurada," her engines, boiler, tackle, and apparel, and against all persons intervening for their interest therein, and against Samuel Hughes, as master, in a cause of action of contract of charter party and damage, respectfully shows and alleges:

53 First. At all the times hereinafter mentioned libellants were and now are co-partners, doing business under the firm name of J. E. Kerr and Company at the city of New York and at Montego Bay, and at other places in the island of Jamaica. Said John E. Kerr, senior, resides at Montego Bay, aforesaid, and said John E. Kerr, junior, resides in the city of New York.

Second. On or about the 19th day of September, 1895, the libellants as such co-partners chartered and hired the iron screw steamship "Laurada" by a charter party, partly in print and partly in writing, for a period of two round trips to the West Indies, at a hire of £550 British sterling per month. A copy of the charter party is hereto annexed, marked A, to be taken as a part of this libel. That it was provided by clause 4 of the charter party "that the whole reach of the steamer's holds, decks, and all places of loading and passenger accommodation of the steamer (not being more than she can reasonably carry and stow) shall be at the charterer's disposal, reserving only proper and sufficient space for the ship's officers, crew, tackle, provisions, stores, and fuel." The owners also agreed by clause 1 thereof to "victual and provide for all passengers in the best manner, according to their class, charterers paying at the rate of six shillings per day for each first class passenger."

Third. That said steamship was duly delivered to the libellants and entered upon said charter with said Samuel Hughes as master, whose residence is at or in the city of Philadelphia, and that the libellants have duly performed all the conditions of the said contract on

their part, and have paid in advance the full charter hire of the said vessel for both of said trips.

Fourth. That the said steamship chartered to them as aforesaid departed from New York on or about the 21st day of October, 1895, being the second of the two contract trips, and in expectancy of her prompt arrival the said charterers had at various ports in the island of Jamaica a valuable cargo of fruits, perishable in their nature, ready for immediate shipment upon arrival of said steamer. That after the said steamer had left the port of New York, as these libellants are informed and believe, and upon such information and belief allege, the said master and owners delayed the progress of said voyage for the purpose of taking on board surreptitiously some thirty-five or more passengers, together with baggage, implements and
54 boats, and the same were carried in the space let to libellants under said contract upon the voyage to some point on the coast of Cuba, where the same were landed, for which said master and owners of said vessel received for passage money for said passengers a large sum of money.

Fifth. That said stoppage and delay and carriage of said passengers, baggage, implements, and boats was without the knowledge or consent of these libellants, and as these libellants are now informed and believe, was in the execution of an unlawful purpose and object.

Sixth. That by reason of the taking on of said passengers, baggage, implements, and boats, as aforesaid, and the landing of the same off the coast of Cuba, the said vessel was delayed in her arrival at the port of Kingston, Jamaica, and in consequence thereof the said cargo of fruit, awaiting her arrival as aforesaid, was seriously injured and damaged.

Seventh. That in addition thereto, by reason of the carriage of said passengers, the steamer was detailed by the custom authorities at Kingston, and in order to let her continue her return voyage the libellants were required to give and did give bond in the penalty of £500, to enable said vessel to proceed to sea, which obligation is still outstanding unsatisfied.

Eighth. That by reason of said delays, carriage of passengers, and expenses incurred, as aforesaid, libellants have suffered damage to the amount of ten thousand dollars.

Ninth. That these libellants, upon the return of the "Laurada," were about to libel the said steamer for said damages sustained, as aforesaid, but the owners and said Hughes as master, with the intent to escape their just liabilities, took the said steamer clandestinely out of the port of New York, to avoid the process of the court.

Tenth. Said steamship has now arrived at Charleston, South Carolina, with said Hughes on board and in command, and is now within the waters of the said port and within the jurisdiction of this honorable court.

Eleventh. All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form may
55 issue against said steamer "Laurada," her engines, etc., and against said Hughes, as master, citing said Hughes and all persons interested in said vessel to appear and answer the matters aforesaid, and that said steamer may be condemned and sold, to satisfy the claim of the libellants, with costs, and that they have such other or further judgment against said Hughes as shall be just.

WING, PUTNAM & BURLINGHAM,
TRENHOLM, RHETT & MILLER,
Libellants' Proctors.

JOHN E. KERR, Jr.

Sworn to before me by John E. Kerr, jr., one of the libellants for himself, and his colibellant, this 15' day of November, 1895.

[L. S.] J. E. HAGOOD, *U. S. Com.*

Charter.

A.

Clark & Service, 21 Bothwell street, Glasgow. Clark, Gray & Co., 147 Leadenhall street, London. Joachim Grieg, Bergen, Norway. Form C.-6'95-1000.

Bennett, Walsh & Co., 18 Broadway, New York. Cable address, "Benwalsh," New York.

TIME CHARTER—WEST INDIA FRUIT TRADE.

This charter party, made and concluded in the city of New York the 19th day of September, 1895, between the Jno. D. Hart Co., of the good iron screw steamship "Laurada" of of tons gross register, having engines of nominal horse power, provided with proper certificate for hull and machinery, and classed and Messrs. J. E. Kerr & Co.

Witnesseth, That the said owners agree to let, and the said charterers agree to hire, the said steamship from the time of delivery at pier 1, N. R., 7 a. m. Monday, Sept. 23rd, 1895, for a period of two round trips to West Indies having cleaned bottom before leaving Europe, being understood that the steamer is to leave if
56 in ballast no later than and if with cargo to some of the West India Islands or Central America no later than she being, on her delivery at New York ready to receive cargo, and being tight, staunch, strong, and in every way fitted for the service, having water ballast, steam winches, and donkey boiler, with capacity to run all the steam winches at one and the same time, including necessary dunnage (and with full complement of officers), seamen, engineers, and firemen for a vessel of her tonnage, to be employed in carrying lawful merchandise, including petroleum or its products, in cases, and passengers so far as accommodations will allow, but any

expense to suit U. S. passenger inspection to be borne by charterers between port and ports in Canada or and other British possessions not north of river St. Lawrence (steamer to leave the St. Lawrence by the 31st of October), and or the United States of America or and West Indies and Gulf of Mexico, or and Caribbean Sea, or and Central America, or and South America, not south of the river Platte, as the charterers or their agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel, also for all engine-room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services, guaranteeing to maintain the boilers in a condition to bear a working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter, and to victual and provide for all passengers in the best manner according to their class, charterers paying at the rate of 6/ per day for each first class passenger.

2. That the charterers shall pay and provide for all the coal, port charges, pilotages, agencies and commissions, and the charterers shall accept and pay for all coal in the steamer's bunkers on delivery at the rate of $3.10 per ton of 2,240 lbs., and the owners shall, on expiration of this charter, pay for all coal left in the bunkers at the same price and can deliver the same quantity at the respective port where she is delivered to them. It is understood that the steamer must have sufficient coal in bunkers on delivery to take her to New York or Boston.

3. That the charterers shall pay for the use of said vessel (£550) five hundred and fifty pounds Br. stlg. lump sum, per calendar
57 month, commencing from the time the vessel is entered at the custom-house and placed with clear holds at charterers' disposal, and, at and after the same rates for any part of a month, hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at New York, Philadelphia or Chester. Payment of said hire to be made in cash in New York at the rate of $4.85 per pound sterling, half monthly in advance from the date of delivery of steamer, and in default of such payment the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they, the owners, may otherwise have on charters in pursuance of this charter; cash for ship's necessary disbursements, if desired by master, but not exceeding £250 monthly, to be supplied by charterers to the captain at current rate of exchange, subject to a commission of 2½ per cent, to cover all charges, and captain's receipt to be taken as part payment of the freight. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire comes due, said payment shall be made for such a length of time as owners, agents, and charterers, or their agents, may agree upon as the estimated time

necessary to complete the voyage, and when the steamer is delivered to owners' agent any difference shall be refunded by steamer or paid by charterers as the case may require.

4. That the cargo or cargoes shall be laden or and discharged with the assistance of the steamer's crew and tackle, in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at all times of tide. That the whole reach of the steamer's holds, decks and all places of loading and passenger accommodation of the steamer (not being more than she can reasonably carry and stow), shall be at the charterers' disposal, reserving only proper and sufficient space for the ship's officers, crew, tackle, provisions, stores and fuel. That the captain shall prosecute his voyages with the utmost dispatch, and take every advantage of wind by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crew and boats. That the captain, although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency or other arrangement; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with their orders and directions. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, they shall make such
58 complaint in writing to an agent in New York specially appointed by owners, who shall have full power to act on their behalf, and, if necessary, dismiss any of the officers should they find the complaints made by the charterers are justified and proven.

5. That the charterers shall have permission to appoint a supercargo, who shall accompany this steamer and be furnished free of charge with first-class fare and accommodations, and to see that the voyages are prosecuted with the utmost dispatch; the crew to follow his directions and instructions in putting on and taking off hatches, ventilation, etc. Captain to report at charterers' office at least once a day. That the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are always to be open to inspection of the charterers or their agents.

6. That the charterers shall have the option of continuing this charter for a further period of one or two and two or and three or and four trips on giving notice thereof to the owners or their agents fifteen (15) days previous to the expiration of each named term.

7. That in the event of loss of time from deficiency of men or stores, break down of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service, and should she in consequence put into any port other than that to which she is bound, the port charges and pilotages at such port shall be borne by steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather or from any

accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense; also if any loss of time from crew or stores not being on board in time, or from repairs to hull and machinery, which are for owners' account, not being complete after cargo and coals are on board and hour of sailing has been fixed by charterers, and notice given to captain, the time lost is for the steamer's account.

8. That should the vessel be lost, any hire paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers with interest from date of loss. The act of God, the United States enemies, fire, restraints of princes, rulers and people, and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigations throughout this charter party always excepted.

59 9. That should any dispute arise between owners and charterers, the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of court. That the owners shall have a lien upon all cargo and all subfreights for any amounts due under this charter, and the charterers shall have a lien upon the ship for all moneys paid in advance and not earned.

10. Ship's bottom to be kept properly cleaned and steamer to be docked whenever captain and charterers may think it necessary; but at least once in every four months. And payment of the hire to be suspended until she is again in proper state for the service.

11. Steamer to work night and day if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging. Steamer to provide men to work winches both day and night as required, charterers agreeing to pay for any night work incurred, at the current local rates. That the steamer be provided with awnings throughout during the whole of this charter, also with wind sails for each hatch, besides stationary ventilators placed at convenient places throughout the deck as charterers may direct. That the steamer shall be provided with loose planks, 2 to 2½ inches thick, to make a platform or deck, all through the vessel's hold, and also provided with beams for such temporary platform or deck to rest on, building the same strong enough to hold tiers of fruit. That the crew is not allowed under any circumstances to carry bananas or other merchandise for their own account. Donkey boiler not to be worked when carrying bananas. That should the steamer have an iron deck, the owners shall agree to have the same sheathed all through with 2½-inch planks, or otherwise charterers to do it at owners' expense.

12. In case Cuba or Central America should quarantine steamers from United States ports, or in case the United States should quarantine steamers from Central America or Cuban ports, charterers to have option of concelling this charter party on giving owners or

agents fifteen (15) days notice of such intention (3 days observation in port of Cuba not to count as quarantine). That on account of the perishable nature of the cargo that this steamer is intended to carry, she is not allowed to stop to pick up any wreck, or in any way assist or tow any vessel, especially when by so doing she is liable to be
60 detained, only in order to save human life. But should any towage or salvage be earned, it is understood it is to be divided between owners and charterers equally, after deducting any expenses such as broken tow ropes, bits, etc., or lost time, coal, etc.

13. That a commission of five per cent upon the gross amount of this charter, and usual freight brokerage, payable by steamships and owners, is due to Bennett, Walsh & Co., upon signing hereof, steamship lost or not. And also upon any continuation or extension of this charter or on sale of vessel.

$25.00 allowed to charterers on account No. 2 winch not being ready.

By authority, dated Sept. 19th, 1895, of the Hart Co.

(Signed) BENNETT, WALSH & Co., *Agents.*

Witness to the signature of—

——— ———.

(Signed) JOHN E. KERR & Co.

Witness to the signature of—

——— ———.

We certify this to be a true copy of the original charter party in our possession.

BENNETT, WALSH & Co., *Brokers.*

(Endorsed:) Filed Nov. 15, 1895. E. M. Seabrook, C. D. C. U. S. S. C.

61 *Stipulation.*

United States of America, District of South Carolina, in the District Court of the United States.

JOHN E. KERR AND JOHN E. KERR, JR., LIBELLANTS,
vs.
THE STEAMSHIP "LAURADA," ENGINE, ETC., AND Samuel Hughes, master, respondents.

Whereas the libel was filed in this State on the 15 day of November by John E. Kerr and John E. Kerr, jr., against the S. S. "Laurada," her engine, boiler, tackle, apparel, and against persons intervening for their interest therein, and against Samuel Hughes as master, for the reason and causes in the said libel mentioned and praying that the same may be condemned and sold to answer prayer of the libellants, and the said libellants and Henry S. Holmes, surety, a resident of the city of Charleston, in the State aforesaid, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now it is therefore hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall pay all such costs as shall be awarded against them by this court or in case of appeal by the appellate court.

JOHN E. KERR & CO.,
By JOHN E. KERR, JR.
HENRY S. HOLMES.

Taken and acknowledged this 15th day of November, 1895, before me.

[SEAL.] J. E. HAGOOD, *U. S. Com.*

(Endorsed:) Filed Nov. 15, 1895. E. M. Seabrook, C. D. C. U. S. S. C.

62 *Monition.*

UNITED STATES OF AMERICA,
Eastern District of South Carolina,
In Admiralty, ss:

The President of the United States of America to the Marshal of the District of South Carolina, greeting:

Whereas a libel hath been filed in the District Court of the United States for the Eastern District of South Carolina, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five, by John E. Kerr and John E. Kerr, jr., against the steamship "Laurada," her engines and boilers, her tackle, apparel, and furniture, in a cause of contract civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court on that behalf to be made and that all persons interested in the said ship or vessel, her tackle, etc., and cargo may be cited in general and special to answer the premises and all proceedings being had that the said ship or vessel, her tackle, etc., and cargo may, for the causes in said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore commanded to attach the said ship or vessel, her tackle, etc., and cargo, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the Eastern District of South Carolina, on the first Tuesday of December next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their

allegations in that behalf; and what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Hon. W. H. Brawley, judge of the said court, at the city of Charleston, in said district, this 15 day of November, A. D. 1895.

WING, PUTNAM AND BURLINGHAM,
TRENHOLM, RHETT AND MILLER,
Proctors for Libellants.

[Seal U. S. Dist. Court, Dist. S. C.]

E. M. SEABROOK,
C. D. C. U. S. S. C.
Per JULIUS SEABROOK, *Dep. Clk.*

63 (Endorsed on back of Monition:) Entered in docket admiralty cases, fol. 196 this Nov. 15, 1895. J. P. Hunter, U. S. marshal.

H. J. Hickson, deputy marshal, being duly sworn, says that in obedience to the within writ he attached the within named steamship "Laurada," her engines, boilers, etc., and took the same into custody at Charleston, S. C., on Nov. 15, 1895; that he served a copy of the within writ on O. Hoya, the first mate of said vessel, and that he posted a copy on the mainmast of said vessel and a copy on the courthouse door all on November 15, 1895.

H. J. HICKSON,
Chief Dep. U. S. Marshal.

Sworn to before me at Charleston, S. C., Nov. 15, 1895.

C. J. MURPHY, [L. S.]
Depty. C. C. C. U. S. S. C.

Filed 15 of November, 1895.

E. M. SEABROOK,
C. D. C. U. S. S. C.

Claim.

District Court of the United States, District of South Carolina, in the District Court, in admiralty.

JOHN E. KERR & CO., LIBELLANTS,
vs.
THE STEAMSHIP "LAURADA," SAMUEL HUGHES, master, respondent.

And now Samuel Hughes, intervening for the interest of William W. Ker, appears before this court and makes claim to the said steamship "Laurada," her tackle, apparel and furniture, boilers and engines, as the same are attached by the marshal, under alleged process of this court, at the instance of John E. Kerr & Co., and the
64 said Samuel Hughes avers that he was in possession of the said steamship at the time of the attachment thereof, and that the

said William W. Ker, above named, is the true and bona fide owner of the said steamship, and that the said Samuel Hughes is master of the said steamship and the true and lawful bailee thereof for the said owner.

Wherefore he prays to be admitted to defend accordingly.

SAM'L HUGHES,
Master, S. S. "Laurada."

Sworn to and subscribed before me this 30 day of November, 1895.

[SEAL.]

F. J. DEVEREUX,
Notary Public for S. C.
J. P. K. BRYAN,
Proctor for Claimant.

(Endorsed:) Filed Dec. 3, 1895. Julius Seabrook, dep. clk. U. S. D. C. S. C.

Stipulation for costs.

District Court of the United States, District of South Carolina, in the District Court, in admiralty.

JOHN E. KERR & CO., LIBELLANTS,
vs.
THE STEAMSHIP "LAURADA," SAMUEL HUGHES, master, respondent.

Whereas the claim was filed in this court on the 3 day of December, 1895, by Samuel Hughes, master of the said steamship "Laurada," claiming the said steamship for William W. Ker, the owner of the said steamship, the said Samuel Hughes, claimant, and Thomas Duggan, a resident of the city of Charleston, in the State aforesaid, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now it is therefore hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, condi-
65 tioned that the claimant above named shall pay all costs as shall be awarded against them by this court or in case of appeal by the appellate court.

SAM'L HUGHES,
Master, S. S. "Laurada."
THOMAS DUGGAN.

Taken and acknowledged before me this 3 day of December, 1895.

[SEAL.]

F. J. DEVEREUX,
Notary Public for S. C.

(Endorsed:) Filed 3 Dec., 1895. Julius Seabrook, Dep. Clk. U. S. Dist. Ct. S. C.

Answer to motion.

District court of the United States, district of South Carolina, in the district court, in admiralty.

JOHN E. KERR & CO., LIBELLANTS,
vs.
THE STEAMSHIP "LAURADA," AND SAMUEL Samuel Hughes, master, respondent.

Trenholm, Rhett and Miller, proctors for libellants, replying to the motion of J. P. K. Bryan, proctor for claimant of steamship "Laurada," to set aside process and warrant of arrest of said steamship on the ground that said process and warrant of arrest were not signed by the clerk or deputy clerk of this court, deny the ground set forth for said motion, and, on the contrary, allege that said process and warrant of arrest were duly signed and sealed by a deputy clerk of this court.

TRENHOLM, RHETT AND MILLER,
WING, PUTNAM AND BURLINGHAM,
Proctors Libellants.

Dec. 6th, 1895, Charleston, S. C.

(Endorsed:) Filed 6 December, 1895. J. Seabrook, Dep. C. D. C. U. S. S. C.

66 *Exception to claim.*

United States of America, district of South Carolina, in the district court, in admiralty.

JOHN E. KERR & CO., LIBELLANTS,
vs.
STEAMSHIP "LAURADA," AND SAMUEL Hughes, master, respondent.

And now comes the libellants, John E. Kerr and Co., and, by way of exception to the claim of Samuel Hughes, master, alleges:

1. That these libellants are informed and believe, and upon such information and belief allege, that William W. Ker, intervening in this cause, through the said Samuel Hughes, master, is not the true and bona fide owner of said steamship "Laurada," and the said Samuel Hughes, master, is not the true and lawful bailee thereof for the said William W. Ker, as stated and alleged in said claim.

Wherefore libellants pray that the said claim be adjudged insufficient, and for such relief thereon as may be just.

TRENHOLM, RHETT AND MILLER,
WING, PUTNAM AND BURLINGHAM,
Proctors Libellants.

DECEMBER 6TH, 1895.

(Endorsed:) Filed 6 December, 1895. J. Seabrook, Dep. C. D. C. U. S. S. C.

Order to release vessel on giving bond.

United States of America, district of South Carolina, in the district court, in admiralty.

KERR AND COMPANY *vs.* S. S. "LAURADA." } Libel.

On motion of J. P. K. Bryan, claimant's proctor, ordered that the marshal release from custody the S. S. "Laurada" upon
67 receiving from claimant a bond in the sum of six thousand dollars, with sufficient surety to be approved by the collector of the port, conditioned to answer the decree of this court in this cause.

WM. H. BRAWLEY, *U. S. Judge.*

DEC. 12, 1895.

(Endorsed:) Filed 12 Dec., 1895. Julius Seabrook, Dep. C. D. C. U. S. S. C.

Bond to marshal.

Know all men by these presents, that we, Samuel Hughes, master of the steamship "Laurada," as claimant for W. W. Ker, owner thereof, and The American Banking and Trust Company, of Baltimore, Maryland, are held and firmly bound unto John P. Hunter, marshal of the United States for the district of South Carolina, in the sum of six thousand dollars, to be paid to the said John P. Hunter, marshal of the United States for the district of South Carolina, his successors, executors, administrators, and assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, successors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 18 day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas a libel has been filed in the district court of the United States for the eastern district of South Carolina, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five, by John E. Kerr and John E. Kerr, jr., co-partners as John E. Kerr and Co., libellants, against the steamship "Laurada," her boilers, engines, tackle, apparel, and furniture, for the sum of ten thousand dollars, on which process of attachment has been issued, and the said steamship "Laurada" is in custody of the said marshal under the said attachment, and Samuel Hughes, master of steamship "Laurada," as claimant of the said steamship for W. W. Ker, the owner thereof, has applied for discharge of said steamship "Laurada" from the custody of the said marshal, and has filed a claim claiming the said steamship, as master, for W. W. Ker as owner thereof, and has filed a stipulation for the claimant's costs, pursuant
68 to the rules and practice of the said court, and whereas said court has, on 12 December, 1895, ordered a release of said

steamship "Laurada" on giving a bond to the marshal of this court in the sum of six thousand dollars.

Now, therefore, the condition of this obligation is such that if the above-bounden Samuel Hughes, master of the steamship "Laurada," as claimant for W. W. Ker, owner thereof, shall abide by and perform the decree of this court, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL HUGHES, [L. S.]
Master S. S. "Laurada," as claimant for W. W. Ker, owner.

THE AMERICAN BANKING AND TRUST
COMPANY OF BALTIMORE, MD., [L. S.]
By atty. in fact, T. Moultrie Mordecai.

Seal and delivered and taken and acknowledged this 18 day of December, 1895, before me.

[SEAL.] JULIUS SEABROOK,
Dep. C. D. C. U. S. S. C.

I approve the sufficiency of the surety of above bond.

G. D. BRYAN,
Collector of Customs.

DECEMBER 18, 1895.

Power of attorney from The American Banking and Trust Company of Baltimore City to T. Moultrie Mordecai, of Charleston, South Carolina.

Know all men by these presents, That The American Banking and Trust Company, a corporation created by and existing under the laws of the State of Maryland, of the city of Baltimore, Maryland, and duly authorized to act as sole surety in the State of South Carolina, have made, constituted, and appointed, and by these presents doth make, constitute, and appoint T. Moultrie Mordecai, of the city of Charleston, South Carolina, its true, sufficient, and lawful attorney for and on behalf of the said corporation as surety, to make, sign, and acknowledge a bond in the penalty of six thousands dollars before the U. S. District Court for District of South Carolina, to be executed by Samuel Hughes, master of the steamship "Laurada," as claimant for W. W. Ker, owner thereof, hereby approving,
69 ratifying, and confirming all that its said attorney may do or lawfully cause to be done in the premises by virtue of these presents.

In testimony whereof the American Banking and Trust Company has caused these presents to be signed by James Bond, the president of said company, and its corporate seal to be hereunto affixed this the twenty-first day of November, 1895.

JAMES BOND, *President.*

Attest:
[SEAL.] GEO. NORBURY MACKENZIE,
Acting Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 21st day of November, 1895, before me, the subscriber, George McCaffray, a commissioner for the State of South Carolina, duly appointed to take proof and acknowledgment of deeds, and other instruments, came James Bond, president, and George Norbury Mackenzie, acting secretary of the American Banking and Trust Company, of Baltimore City, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of the same; and being by me duly sworn, severally and each for himself, deposeth and saith that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal at the city of Baltimore, the day and year first above written.

[SEAL.] GEO. MCCAFFRAY,
Commissioner of Deeds for South Carolina in Maryland.

(Endorsed:) Filed 18 Dec., 1895. Julius Seabrook, Deputy Clerk, U. S. Ct.

70 *Decree.*

United States of America, Eastern District of South Carolina, District Court, in Admiralty.

JOHN E. KER & COMPANY
vs.
S. S. "LAURADA." } Libel in rem.

This cause came on to be heard before the District Court of the United States for the District of South Carolina on the records, pleadings, and proofs herein.

Whereupon it is now ordered, adjudged, and decreed that the libel herein be dismissed for want of jurisdiction of the court in rem in this cause, and process herein being void.

WM. H. BRAWLEY, *U. S. Judge.*

5 DEC., 1899.

We consent.

TRENHOLM, RHETT & MILLER,
Proctors for Libellants.

(Endorsed:) Filed Dec. 5, 1899. C. J. C. Hutson, C. D. C. U. S. S. C.

Bill of sale of registered vessel.

THE UNITED STATES OF AMERICA.

Sections 4170, 4171, 4192, 4193, 4194, and 4196, Revised Statutes.
Cat. No. 517.

To all to whom these presents shall come, greeting:

Know ye, That I, John D. Hart, of Camden, State of New Jersey, owner of the steamship or vessel called the "Laurada," formerly the S. S. "Empress of Dundee," of the burden of 775 x/100 tons, or thereabouts, for and in consideration of the sum of one dollar, lawful money of the United States of America, to me in hand paid, before the sealing and delivery of these presents by William W. Ker, of Philadelphia, the receipt whereof I do hereby acknowledge and am therewith fully satisfied, contented, and paid; have bargained
71 and sold, and by these presents do bargain and sell unto the said William W. Ker, his executors, administrators, and assigns, of the said steamship, or vessel, together with the sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the certificate of the registry of which said or vessel is as follows, viz:

Official No. Numerals. Letters. Register No. .

Certificate of registry.

In pursuance of Chapter I, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States, having taken and subscribed the required by law, and having that he, the only owner of the vessel called the of whereof is at present master, and is a citizen of the United States, and that the said vessel was built in the year 18 , at , as appears by and having certified that the said vessel has deck, and mast; and that her length is and tenths feet; her breadth feet and tenths; her depth feet and tenths; her height feet and tenths; that she measures tons and hundredths, viz: viz:

	Tons, 100ths.
Capacity under tonnage deck	
Capacity between decks above tonnage deck	
Capacity of inclosures on the upper deck, viz,	
Gross tonnage	

Deductions under sec. 4153, R. S., as amended by act March 2, 1895:

Crew space, ; master's cabin,	
Steering gear, ; anchor gear, ;	
boatswain's stores,	
Chart house, ; donkey engine & boiler,	
Storage of sails, ; propelling power,	
Total deductions	
Net tonnage	

72 The following described spaces, and no others, have been omitted, viz:

and that she is a , has a head and a stern; and the said having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at the port of .

Given under my hand and seal, at the port of , this day of , in the year of one thousand eight hundred and ninety.

———— ————, [SEAL.]
Naval Officer.

———— ————, [SEAL.]
Collector of Customs.

———— ————,
Commissioner of Navigation.

[Seal of United States Treasury.]

To have and to hold the said vessel and appurtenances thereunto belonging, unto him the said William W. Ker, his executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of him the said William W. Ker, his executors, administrators, and assigns forever; And I, the said John D. Hart, have promised, covenanted, and agreed, and by these presents do promise, covenant, and agree, for myself, my heirs, executors, and administrators, to and with the said William W. Ker, his heirs, executors, administrators, and assigns, to warrant and defend the said vessel, and all the other before mentioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, the said John D. Hart, has hereunto set his hand and seal this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN D. HART. [SEAL.]

Signed, sealed, and delivered in the presence of—
S. G. SIMPSON.
H. R. SHULTZ.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

73 Be it known that on this 24th day of January, 1895, personally appeared before me, John D. Hart, to me known, and acknowledged the within instrument to be his free act and deed.

In testimony whereof I have hereunto set my hand and seal this 24th day of January, A. D. 1895.

[SEAL.]
H. M. D.

H. R. SHULTZ,
Notary Public.

I bereby certify that the above is a true copy of the original record in the custom-house, Philadelphia, Pa., made January 27th, 1895, 1.30 p. m., in Book 19, page 11.

Witness my hand and seal this 30th day of June, A. D. 1902.

C. W. HILL,
Deputy Collector.

[Naval Office, Port of Philadelphia, June 30, 1902.]

[Seal District of Philadelphia, Port of Philadelphia, Collector of Customs.]

Certificate of registry.

37. Cat. No. 335. Register No. 87. Copy of . Official number. Numerals. Letters. Permanent. 141,364. K. M. D. P.

In pursuance of chapter one, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States, William W. Ker, of Philadelphia, Pa., having taken and subscribed the oath required by law, and having sworn that he is the only owner of the vessel called the "Laurada," of Philadelphia, whereof Samuel Hughes is at present master, and is a citizen of the United States; and that the said vessel was built in the year 1864, at Middlesboro, England, as the S. S. "Empress," registered as an American vessel by Act of Congress, approved January 16, 1895, and telegram of instructions, dated Washington, D. C., January 26, 1895, p. m., and letter of Hon. E. G. Chamberlain, Commissioner of Navigation, Washington, D. C., January, 18, 1895, and Jas. P. McCann, 74 Spt. Dy. Surveyor, of the port and district of Philadelphia, Pa., having certified that the said vessel has three decks and two masts, and that her length is 230 and 1 tenth feet, her breadth 30 feet and 2 tenths, her depth 17 feet and 8 tenths; that she measures 898 tons and 75 hundredths, viz:

	Tons.	100ths.
Capacity under tonnage deck	783	33
Capacity between decks above tonnage deck 'tween deck	416	96
Capacity of inclosures on upper deck, viz, deck house	7	02
Gross tonnage	1207	31
Deductions under Sec. 4153, R. S. as amended by Act of March 2, 1895:		
Crew space, 46.44; master's cabin		
Steering gear, ; anchor gear, ; boatswain's stores		
Chart house, engine & boiler, 262.12		
Storage of sails, ; propelling power;		
Total deductions, 30856	308	56
Net tonnage	898	75

The following described spaces, and no others, have been omitted, viz:

and that she is an iron (screw) steamship, has a figurehead and a round stern; and the said William W. Ker having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at the port of Philadelphia.

Given under my hand and seal, at the port of Philadelphia, this 27th day of January, in the year one thousand eight hundred and ninety-five.

[Place for seal of collector.] JOHN R. READ,
Collector of Customs.

[Place for seal of naval officer.] H. B. GESSINGER,
Dy. Naval Officer.

[Seal of the United States Treasury.] E. C. O'BRIEN,
Commissioner of Navigation.

75 (Endorsed on back:) District of Philadelphia, port of Philadelphia, collector's office.

I hereby certify the within to be a true copy of the original on record in this office.

Given under my hand and seal this 30th day of June, 1902.

R. Q. G. C. W. HILL, [SEAL]
D. Collector.

[Stamp: Naval Office, Port of Philadelphia, Jun. 30, 1902.]

Exemplification.

No. 11823.

PHILADELPHIA CITY AND COUNTY, *ss*:

I, Jacob Singer, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania.

Do hereby certify and make known that on the 17 day of January in the year of our Lord one thousand nine hundred and two, letters testamentary on the estate of William W. Ker, deceased, were granted unto Roxana S. Ker, she having first been qualified well and truly to administer the same.

Given under my hand and seal of office this 6 day of December, 1902.

[SEAL.] JACOB SINGER, *Register.*

(Form 12 R. W.)

STATE OF PENNSYLVANIA,
Philadelphia County, ss:

I, William B. Hanna, president judge of the orphans' court of Philadelphia County, do certify, that the foregoing certificate and

attestation, made by Jacob Singer, esq., register of wills and
76 ex officio clerk of said orphans' court, whose name is thereto subscribed and seal of his office affixed, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand this 6th day of December, in the year of our Lord one thousand nine hundred and two (1902).

WM. B. HANNA, [L. S.]
President Judge.

STATE OF PENNSYLVANIA,
Philadelphia County, ss:

I, Jacob Singer, esq., register of wills and ex officio clerk of the orphans' court of Philadelphia County, do certify that the Honourable William B. Hanna, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, president judge of the orphans' court of Philadelphia County, duly commissioned and sworn; to all whose acts, as such, full faith and credit are and ought to be given, as well as in Courts of Judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 6 day of December, in the year of our Lord one thousand nine hundred and two (1902).

[SEAL.] JACOB SINGER,
Register of Wills and ex officio Clerk of the Orphans' Court.

Will of Wm. W. Ker.

Know all men, that I, William W. Ker, of the city of Philadelphia, in the State of Pennsylvania, attorney at law, do make and publish this my last will and testament.

All the estate of which I may die possessed, real, personal and mixed, whatsoever and wheresoever, I do give devise and bequeath unto my dear wife, Roxana S. Ker, her heirs and assigns forever; and I do hereby appoint my said wife, Roxana S. Ker, executrix of this my last will and testament.

In witness whereof I do hereunto set my hand and seal, at Philadelphia, this thirteenth day of March, A. D. 1884.

WILLIAM W. KER. [L. S.]

CITY AND COUNTY OF PHILADELPHIA, *ss:*

REGISTER'S OFFICE, *January 17, 1902.*

Then personally appeared P. E. Carroll and Chas. E. Ker, who
77 being duly sworn according to law, say that they were well acquainted with William W. Ker, the testator above named, in his life time, and are familiar with his signature, having frequently seen him write his name, as well as other matters; that they have carefully examined the foregoing signature "William W. Ker"

to will dated March 13, '84, and verily believe it to be in his own proper handwriting, as well as the body of the will.

P. E. Carroll,
Chas. E. Ker.

Sworn and subscribed before me the date above.

Chas. Irwin,
Deputy Register.

City and County of Philadelphia, *ss:*

Register's Office, *January 17, 1902.*

I do swear that as the executrix of the foregoing last will and testament of William W. Ker, deceased, I will well and truly administer the goods and chattels, rights and credits of said deceased, according to law; and that I will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.

That the said testator died on the 31 day of December, A. D. 1901, at 10.45 o'clock p. m.

Roxana S. Ker,
64 North 34th St.

Sworn and subscribed before me the date above, and letters testamentary granted unto her.

Chas. Irwin,
Deputy Register.

State of Pennsylvania,
City and County of Philadelphia.

Be it remembered that, on the seventeenth day of January, A. D. 1902, before me, Jacob Singer, Charles Irwin, register of wills for the city and county aforesaid, after due proof and hearing had, according to the laws of the said State, it is ordered and decreed, that the last will and testament of William W. Ker, late of said
78 city and county, deceased, be duly admitted to probate and filed of record in the office of the register of wills of the said city and county.

In testimony whereof I have hereunto set my hand the day and year above written.

Jacob Singer, *Register.*

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Register's Office, *March 22, 1907.*

I, Charles Irwin, register of wills and ex officio clerk of the orphans' court for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a full and complete copy of the last will and testament of William W. Ker, deceased, together with the probate thereof upon which letters

testamentary were granted unto Roxana S. Ker on the 17th day of January, A. D. 1902, as the same remains on file and of record in this office.

In testimony whereof I have hereunto set my hand and official seal at Philadelphia the date above.

[SEAL.] CHAS. IRWIN,
Register of Wills and ex officio Clerk of the Orphans' Court.

STATE OF PENNSYLVANIA,
Philadelphia County, ss:

I, William N. Ashman, president judge of the orphans' court of Philadelphia County, do certify that the foregoing certificate and attestation, made by Charles Irwin, esq., register of wills and ex officio clerk of said orphans' court, whose name is thereto subscribed and seal of his office affixed, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand this 22 day of March, in the year of our Lord one thousand nine hundred and seven (1907).

W. N. ASHMAN, [L. S.]
President Judge.

STATE OF PENNSYLVANIA,
Philadelphia County, ss:

I, Charles Irwin, esq., register of wills and ex officio clerk of the orphans' court of Philadelphia County, do certify that the Honourable William N. Ashman, by whom the foregoing attestation
79 was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, president judge of the orphans' court of Philadelphia County, duly commissioned and sworn; to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, this 22 day of March, in the year of our Lord one thousand nine hundred and seven (1907).

[SEAL.] CHAS. IRWIN,
Register of Wills and ex officio Clerk of the Orphans' Court.

Telegrams.

[78 A. F. C. F. 76 paid Govt. 435 P. M.]

WASHINGTON, D. C., *Nov. 15.*

COLLECTOR CUSTOMS,
Charleston, S. C.:

Secretary State requests this dept. to take such instant and appropriate action as is necessary to vindicate the neutrality laws in the case of the steamer "Laurada," supposed to have landed a hostile expedition from the United States in Cuba. If the vessel arrives in

your district you will please take measures for her detention and report acts to this department without delay. Consult United States attorney.

C. S. HAMLIN, *Acting Secy.*

[51A. CH. AD. 50 paid Govt. 249 P. Nov. 16.]

WASHINGTON, D. C., 16.

COLLECTOR CUSTOMS,
Charleston, S. C.:

Referring to telegram yesterday relative to steamer "Laurada," collector customs Philadelphia states that he advised by maritime exchange that she has just arrived at your port. Take measures as directed in yesterday's telegram for detention vessel and report by telegraph.

C. S. HAMLIN, *Acting Secretary.*

80 *Letters.*

CHARLESTON HOTEL,
Charleston, S. C., Nov. 20, 1895.

Hon. GEO. D. BRYAN,
Collector of Customs, Charleston, S. C.

MY DEAR SIR: We are informed that you are detaining the steamer "Laurada" on behalf the United States.

We are desirous that she shall forthwith proceed and therefore beg to inquire if she may do so now, as we do not wish to advise conflict with the instructions of the Government of the U. S. We request an early reply.

Very truly, yours,

M. C. BUTLER,
Counsel for S. S. "Laurada."

Please address me 11 Broad St., Charleston, S. C., P. O. Box 244.

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF CHARLESTON, S. C.,
November 20, 1895.

Hon. M. C. BUTLER.
Counsel for S. S. "Laurada."

MY DEAR SIR: Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I am "detaining the steamer 'Laurada' on behalf of the United States."

I could not permit her to proceed as indicated in your letter as my instructions are to detain her.

Yours, very truly,

G. D. BRYAN, *Collector.*

81 *Letter.*

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF CHARLESTON, S. C.,
Dec. 6, 1895.

Hon. M. C. BUTLER,
Counsel for S. S. "Laurada," Charleston, S. C.

SIR: I beg to inform you, that under instructions from the Government I have to-day withdrawn my inspector from the "Laurada" and she is free, so far as this office is concerned.

Yours, respectfully,

G. D. BRYAN, *Collector.*

Motion to direct verdict.

Mr. COCHRAN. We move the court to direct a verdict for the defendant upon these grounds:

1. That it is shown by the evidence beyond dispute that at the time of the supposed detention of the "Laurada" by the collector, as alleged in the complaint, the "Laurada" was then being held by the marshal under process from the district court in admiralty, and was in the custody of the law.

2. That it is shown beyond dispute that the collector in no way interfered with the possession of the marshal, and that his act in putting an inspector on board, after she had been seized by the marshal, and withdrawing his inspector before the marshal released the ship from custody, was a vain, nugatory, futile, and void act.

3. That it being shown beyond dispute that at no time was this vessel in the control or custody of the collector, but the same being in control and custody during the whole period alleged in the complaint of another person, that there could be no damage against the collector.

4. That it is shown that the suit is really one against the United States.

82 5. That the plaintiff's remedy should be against the marshal or against the complainants in the libel proceeding, and not against the collector.

COURT. In the last two grounds I don't think there is anything; but on the first, second, and third I will hear the other side.

Upon hearing argument of counsel on the motion, the court instructs the jury as follows:

COURT. Mr. Foreman and gentlemen: The court will have to instruct you to bring in a verdict for the defendant in this case. There is certainly an appearance of blame, a good claim on the part of the plaintiff, which could be presented to the Congress of the United States or to the Court of Claims possibly, which may consider the equities of the case, but as a mere question of law it seems to me that the plaintiff has no case, that the ship was not in the possession of the collector of the port, but was in the possession of the marshal, and it appeared to be a lawful process, and if she was in the possession of

the marshal, then she could not have been in the possession of the collector, and the collector therefore is not responsible. That is the view that I take of the facts of the case. There is not any doubt that if the marshal had not taken possession, had not been in possession, that the collector of the port would have detained her, for he had instructions to do so, and there is no doubt that he intended to execute those instructions.

The facts are, the court may state briefly—there is no special bearing now upon the question, the verdict is decided—that this steamship "Laurada" had been employed in the trade between New York and Kingston, Jamaica, and that on her last trip out, where she was going for a cargo of fruit, under a charter party with Kerr & Company, that she took on just outside of the port of New York a military expedition to Cuba, and instead of proceeding directly to her destination she went to the island of Cuba and delivered under cover of night these Cubans, under command of their own officers, when running there. She then went to Jamaica and took her cargo of fruit, and came back and went out of the port of New York and came to Charleston to take on a cargo of pyrites cinders. The charterers, Kerr & Company, feeling that they had been aggrieved by this delay, in the voyage from New York to Jamaica, by reason of the conduct of Hughes in taking this military expedition, they
83 filed their libel in Charleston against the ship and had her arrested, and the United States marshal put his men aboard and she was in possession of the marshal. About that time the Government of the United States, at that critical period of the relations of this Government and the Government of Spain, knowing or having reason to believe that this "Laurada" had been engaged in carrying this military expedition to Cuba, and thus suspecting, or being informed by the Spanish Government that she was here on a similar mission, in order to preserve the obligations of neutrality, authorized the collector of this port, ordered him, to detain the ship, fearing that she was going to violate the neutrality laws. Now, all that question, at least the right of the Government to seize the ship, was considered more or less in the trial of Captain Hughes. He was tried for assisting, or conducting, a military expedition. The sympathy of this people was generally with the Cubans in those days, and the jury acquitted him, but there was not any doubt that a military expedition had been carried out to Cuba by Captain Hughes and by this ship "Laurada;" but that would not have justified the taking of the ship; the Government had no case at all, in the judgment of this court, in authorizing the seizure. If the collector had seized the ship in point of fact, the plaintiff would have a good claim, and it would be the duty of the court to instruct you to find a verdict for the plaintiff. The Government acted in good faith and in the desire to preserve the peace, observe its obligations, believing that this ship was engaged in an unlawful purpose, in assisting the Cubans to make a military expedition. It just happens sometimes that Providence, that looks after drunken men and children, does help the Govern-

ment; it is not often that the Government of the United States is saved by a chance of that sort. Generally everybody is disposed to make the Government pay, whether it ought to or not, but it happens in this case that by reason of the fact that Kerr and Company, commercial people, who had nothing to do with the Government, felt themselves aggrieved by this conduct of Hughes on the previous voyage, seized the ship down here, and it was in possession of the marshal in that suit. Now it is argued, with great acuteness and with great ability, that that proceeding was unlawful from the beginning; that is, that the deputy clerk had no right to authorize his brother to sign and to put the seal of the court upon the monition, and also argued that there was no jurisdiction, that Kerr and Company had no just claim against the ship which could be inforced in admiralty, and that all that proceeding is void. If this were a suit against the marshal, all of that learning would be valuable, and probably the court would hold that the marshal could not be protected
84 under a void proceeding; but that is not this case. The simple question here is whether or not the marshal had possession; if the marshal had possession, then the collector did not. Undoubtedly upon the proof the marshal did have possession of that ship, and the Government gets out in that way. If they have a claim against the Government, they can present that in some other way, but in this proceeding it is my duty to instruct you, as I do, that it is your duty to find a verdict for the defendant.

Before the jury leaves the bar, Mr. Bryan notes exception to the court's direction of a verdict for the defendant, with the privilege (accorded by the court) of setting forth more particularly in detail the exceptions hereafter.

Exceptions.

The following exceptions were served with the bill of exceptions by plaintiff:

FIRST EXCEPTION.

1st. The court erred in instructing the jury to bring in a verdict for the defendant on the whole evidence.

SECOND EXCEPTION.

The court erred in holding and charging as follows: "As a mere question of law it seems to me that the plaintiff has no case, that the ship was not in the possession of the (defendant) collector of the port, but was in the possession of the marshal, and it appeared to be a lawful process, and if she was in possession of the marshal then she could not have been in the possession of the (defendant) collector, and the (defendant) collector therefore is not responsible."

THIRD EXCEPTION.

The court erred in not holding that the (defendant) collector was detaining the ship in point of fact.

FOURTH.

The court erred in holding and charging "Now, it is argued with great acuteness and with great ability that the proceeding was unlawful from the beginning—that is, that the deputy clerk had no right to authorize his brother to sign and to put the seal of the court
85 upon the monition—and also argued that there was no jurisdiction, that Kerr & Company had no just claim against the ship which could be enforced in admiralty, and that all that proceeding is void. If this were a suit against the marshal all of that learning would be valuable, and probably the court would hold that the marshal could not be protected under a void proceeding, but that is not this case."

FIFTH.

The court erred in holding and charging "The simple question here is whether or not the marshal had possession; if the marshal had possession, then the collector did not. Undoubtedly upon the proof the marshal did have possession of the ship, and the Government gets out in that way."

SIXTH.

The court erred in not holding that the marshal of the United States for district of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest in the case of Kerr & Company vs. S. S. "Laurada," on the ground that the District Court of the United States for the district of South Caorlina, sitting as a court of admiralty, had no jurisdiction in rem of the subject-matter of said suit, and that said warrant was therefore illegal, null, and void, and was no warrant and due process of law to said marshal.

SEVENTH.

The court erred in not holding that the marshal of the United States for district of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest in the case of Kerr & Company vs. S. S. "Laurada," on the ground that it appears by the evidence the said warrant of arrest was not issued out of said court and signed and the seal of said court affixed by the clerk of the said District Court of the United States for the district of South Carolina, or his deputy, but that same was issued, signed, and the seal of said court attached by a private, unofficial person in the absence from the district of South Carolina of both the clerk & the deputy clerk of the district of South Carolina, and said warrant of arrest was therefore illegal, null, and void, and was no warrant and due process of law to said marshal.

EIGHTH.

That the court erred in not holding, on the facts of this case,
86 that in detaining the S. S. "Laurada" both the marshal of the district of South Carolina, under the said warrant, in the case of Kerr & Company vs. the "Laurada," and the said defendant, collector, were both trespassers, and as such joint trespassers, and joint tort-feasors were unlawfully holding and detaining said S. S. "Laurada," and that they were both and each of them, jointly or severally, liable for the damages for detention.

NINTH.

That the court erred in holding the defendant was saved from liability in this suit for his admitted detention of the S. S. "Laurada" because of the detention at the same time by the United States marshal, acting under a void warrant of arrest of said S. S. "Laurada" in the case of Kerr & Company vs. the S. S. "Laurada."

Inasmuch as the aforesaid matters do not appear by the judgment of the court, the plaintiffs, by their counsel, pray that this their bill of exceptions might be allowed, and it is accordingly allowed, signed, and sealed by the presiding judge this 13 day of February, 1908.

The time for drawing up and sealing the same having been extended by the order of the court.

WM. H. BRAWLEY [L. S],
U. S. Judge.

Petition for writ of error and assignment of errors.

Filed February 29th, 1908.

United States of America, district of South Carolina, in the Circuit Court, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, plaintiff,
vs.
GEORGE D. BRYAN, COLLECTOR OF THE PORT of Charleston, defendant.

To the Honorable Judge of the Circuit Court of the United States for the district of South Carolina:

The plaintiff, Roxana S. Kerr, executrix of W. W. Kerr, plaintiff in error, by their counsel, respectfully assigns the following errors to the decision and judgment of the presiding judge for trial of cause above named, heard on the 9th day of December, 1907.

87 FIRST ASSIGNMENT.

The court erred in instructing the jury to bring in a verdict for the defendant on the whole evidence.

SECOND ASSIGNMENT.

The court erred in holding and charging as follows: "As a mere question of law it seems to me that the plaintiff has no case, that the ship was not in the possession of the defendant, collector of the port, but was in the possession of the marshal, and it appeared to be a lawful process, and if she was in the possession of the marshal then she could not have been in the possession of the defendant, collector, and the defendant, collector, therefore is not responsible."

THIRD ASSIGNMENT.

The court erred in not holding that the defendant, collector, was detaining the ship in point of fact.

FOURTH ASSIGNMENT.

The court erred in holding and charging "now, it is argued with great acuteness and with great ability that the proceeding was unlawful from the beginning, that is that the deputy clerk had no right to authorize his brother to sign and to put the seal of the court upon the monition, and also argued that there was no jurisdiction, that Kerr & Company had no just claim against the ship which could be enforced in Admiralty, and that all that proceeding is void. If this were a suit against the marshal all of that learning would be valuable, and probably the court would hold that the marshal could not be protected under a void proceeding, but that is not this case."

FIFTH ASSIGNMENT.

The court erred in holding and charging "the simple question here is whether or not the marshal had possession; if the marshal had possession then the collector did not. Undoubtedly upon the proof the marshal did have possession of the ship and the Government gets out in that way."

SIXTH ASSIGNMENT.

88 The court erred in not holding that the marshal of the United States for District of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest, in the case of Kerr & Company vs. S. S. "Laurada," on the ground that the District Court of the United States for the District of South Carolina, sitting as a Court of Admiralty, had no jurisdiction in rem of the subject-matter of said suit, and that said warrant was therefore illegal, null and void, and was no warrant and due process of law to said marshal.

SEVENTH ASSIGNMENT.

The court erred in not holding that the marshal of the United States for District of South Carolina was a tresspasser in taking possession of and holding the S. S. "Laurada" under the warrant of

arrest in the case of Kerr & Company vs. S. S. "Laurada" on the ground that it appears by the evidence the said warrant of arrest was not issued out of said court and signed, and the seal of the said court affixed, by the clerk of the said District Court of the United States for District of South Carolina or his deputy, but that same was issued, signed, and the seal of said court attached by a private, unofficial person, in the absence from the District of South Carolina of both the clerk and the deputy clerk of the District of South Carolina, and said warrant of arrest was therefore illegal, null and void, and was no warrant and due process of law to said marshal.

EIGHTH ASSIGNMENT.

That the court erred in not holding on the facts of this case that in detaining the S. S. "Laurada," both the marshal of the District of South Carolina, under the said warrant, in the case of Kerr & Company vs. the "Laurada," and the said defendant, collector, were both trespassers, and as such joint trespassers and joint tort-feasors were unlawfully holding and detaining said S. S. "Laurada" and that they were both and each of them, jointly and severally, liable for the damages for detention.

NINTH ASSIGNMENT.

That the court erred in holding the defendant was saved from liability in this suit for his admitted detention of the S. S. "Laurada" because of the detention at the same time by the United States marshal acting under a void warrant of arrest of said S. S. "Laurada" in the case of Kerr & Company vs. the S. S. "Laurada."

Wherefore, for these and other errors apparent on the record,
89 plaintiff prays a writ of error, that the same may be allowed, and that a transcript of this record and proceedings and papers in this case, duly authenticated, may be sent to the Circuit Court of Appeals U. S. for the Fourth Circuit, sitting at Richmond, Va., and as in duty bound will ever pray.

J. P. K. BRYAN,
M. C. BUTLER,
Attorney for Plaintiff in Error.

At Charleston, S. C., on the 29 day of February, 1908.

Appeal allowed.

WM. H. BRAWLEY, *U. S. Judge.*

Appeal bond and approval.

Filed Feb. 29, 1908.

UNITED STATES OF AMERICA.

Know all men by these presents, that we, Roxana S. Ker, as executrix of W. W. Kerr, as principal, and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto

George D. Bryan, collector of port of Charleston, in the full and just sum of two hundred and fifty dollars to be paid to the said George D. Bryan, collector of port of Charleston, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated 27th day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the District of South Carolina, in the suit depending in said court between Roxana S. Ker, as executrix of W. W. Ker, plaintiff, and George D. Bryan, collector of port of Charleston, defendant, a judgment was rendered against the said plantiff, and the said plaintiff having obtained an appeal and writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said George D. Bryan, collector of port of Charleston, defendant citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

90 Now, the condition of the above obligation is such that if the said Roxana S. Ker, as executrix of W. W. Ker, shall prosecute said writ of error and appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ROXANA S. KER, [SEAL.]
Ex'x of W. W. Ker.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HENRY STRAUSS,
Resident Vice-President.

Attest:

FRANK M. FLYNN, [SEAL.]
Resident Secretary.

In the presence of—
WILLIAM W. LUCAS,
CLARENCE J. LONDON.

Approved:

WM. H. BRAWLEY, *U. S. Judge.*

Form of affidavit, acknowledgment, and justification by guarantee or surety company.

STATE OF PENNSYLVANIA,
County of Philadelphia, City of Philadelphia, ss:

On this 27th day of January, one thousand nine hundred and eight, before me personally came Henry Strauss, known to me to be the resident vice-president of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Roxana S. Ker, executrix, as surety thereon, and

who being by me duly sworn, deposes and says that he resides in the city of Philadelphia, State of Pennsylvania; that he is the resident vice-president of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain
91 corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (Form) of Roxana S. Ker, executrix, is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he is acquainted with Frank M. Flynn and knows him to be the resident secretary of said company; and that the signature of said Frank M. Flynn subscribed to said bond is in the genuine handwriting of said Frank M. Flynn and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts, and liabilities of every nature whatsoever by more than the sum of one million five hundred thousand dollars ($1,500,000.00).

HENRY STRAUSS,
Resident Vice-President.

Sworn to, acknowledged before me, and subscribed in my presence this 27th day of January, 1908.

FLORENCE GIGON,
Notary Public.

My commission expires at end of next session of senate.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the Circuit Court of the United States for the District of South Carolina, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Roxana S. Ker, executrix of W. W. Ker, plaintiff, and George D. Bryan, collector of the port of Charleston, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United
92 States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond

on the 30th day of March next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-ninth day of February, in the year of our Lord one thousand nine hundred and eight.

[Seal of court.] C. J. MURPHY,
Clerk of the Circuit Court of the United States,
Dist. South Carolina.

Allowed by—
WM. H. BRAWLEY, *U. S. Judge.*
Filed Feby. 29, 1908.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George D. Bryan, collector of the port of Charleston, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 30th day of March, 1908, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, District of South Carolina, wherein Roxana S. Ker, executrix of Wm. W. Ker, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. H. Brawley, judge of the Circuit Court of the United States, this twenty-ninth day
93 of February, in the year of our Lord one thousand nine hundred and eight.

WM. H. BRAWLEY,
U. S. Judge.

Filed Feby. 29, 1908.

C. J. MURPHY,
C. C. C. U. S. Dist. S. C.

A copy of the foregoing citation received this 29th February, 1908.

ERNEST F. COCHRAN,
U. S. Attorney, Defendant's Atty.

Order to transmit record.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

[Seal of court.]

C. J. MURPHY,
C. C. C. U. S. Dist. S. C.

Clerk's certificate.

United States of America, District of South Carolina, in the Circuit Court, Fourth District.

I, C. J. Murphy, clerk of the Circuit Court of the United States for the District of South Carolina, do hereby certify that the foregoing is a true and correct copy of all the records and proceedings in the case of Roxana S. Ker, executrix, plaintiff, against George D. Bryan, collector of port of Charleston, S. C., defendant, rendered as aforesaid, together with the judgment and all things relating to the same, as appears by the record now on file in my office.

Given under my hand and seal of said court at clerk's office in the city of Charleston, S. C., in the district aforesaid, this 20th day of March, A. D. 1908.

[Seal of court.]

C. J. MURPHY,
C. C. C. U. S. Dist. S. C.

95 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED, plaintiff in error,
vs.
GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant in error.
} No. 808.

In error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

March 26, 1908, transcript of record is filed and cause docketed.

Same day, appearance of J. P. K. Bryan for the plaintiff in error, order filed.

March 30, 1908, appearance of Ernest F. Cochran, U. S. attorney, and T. W. Bacot, asst. U. S. attorney, for the defendant in error, order filed.

April 18, 1908, twenty copies of the printed record are filed.

Stipulation as to filing briefs.

Filed April 20, 1908.

United States of America, in the Circuit Court of Appeals, Fourth Circuit.

ROXANA S. KER, AS EXECUTRIX, PLAINTIFF IN ERROR,
vs.
GEORGE D. BRYAN, AS COLLECTOR, DEFENDANT IN ERROR. } No. 808.

It is hereby stipulated and agreed by and between counsel for plaintiff in error and defendant in error, respectively, that the time for filing the printed brief of authorities on the part of the plaintiff in error is hereby extended to May 4, 1908, and the time for filing brief of authorities on the part of the defendant in error is hereby extended to May 11, 1908.

Dated April 9th, 1908.

J. P. K. BRYAN,
Counsel for Plaintiff in Error.
ERNEST F. COCHRAN,
U. S. Attorney,
T. W. BACOT,
Asst. U. S. Attorney,
Counsel for Defendant in Error.

97 May 28, 1908 (May term, 1908), cause came on to be heard and is argued by counsel before Pritchard, circuit judge, and Waddill and Boyd, district judges, and submitted.

July 28, 1908 (same term), the court announced and filed its opinion, which is as follows, to wit:

OPINION.

FILED JULY 28, 1908.

United States Circuit Court of Appeals, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED, plaintiff in error,
versus
GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant in error. } No. 808.

In error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

Argued May 28, 1908. Decided July 28, 1908.

Before Pritchard, circuit judge, and Waddill and Boyd, district judges.

J. P. K. Bryan (M. C. Butler on the brief) for plaintiff in error, and Ernest F. Cochran, United States attorney (T. W. Bacot, assistant United States attorney, on the brief), for defendant in error.

Boyd, District Judge:

This is a civil action brought in the Circuit Court of the United States for the district of South Carolina, at Charleston, originally by William W. Ker, a citizen and resident of the State
98 of Pennsylvania, against George D. Bryan, a citizen and resident of the State of South Carolina, collector of the port of Charleston. Since the commencement of the action William W. Ker has died and Roxana S. Ker, executrix of his last will and testament, has been made party plaintiff. In the action the plaintiff in error here, who was the plaintiff below, seeks to recover damages from George D. Bryan, collector of the port of Charleston, the defendant in error here, who was the defendant below, for the alleged wrongful seizure and detention of the American steamship "Laurada," a merchant vessel of the United States of the burden of 899 tons, registered at the port of Philadelphia, which said steamship was owned by the plaintiff. Plaintiff's cause of action is set forth specifically in the third and fourth paragraphs of the complaint filed, which are as follows:

"3rd. That on the sixteenth day of November, 1895, the said steamship 'Laurada' being in the port and harbor of Charleston, proceeding, with her officers and crew on board, in the due fulfilment of her freight engagements as a merchant vessel of the United States, the said George D. Bryan, claiming to act as collector of the port of Charleston, and in the name of the United States, unlawfully seized and caused to be seized the said steamship 'Laurada' and under an alleged authority and direction of the Government of the United States unlawfully and wrongfully detained the said steamship 'Laurada' at the custom-house wharf in the port and harbor of Charleston, in the district of South Carolina, and refused to allow said steamship to proceed in the due fulfilment of her freight engagements for the space of twenty-one days, to-wit, from the 16th day of November, 1895, to and inclusive of the 6th day of December, 1895.

"4th. That all such acts and doings of the said George D. Bryan, claiming to act as collector of the port of Charleston, and under an alleged authority and direction of and in the name of the Government of the United States, were without warrant of law, and all such alleged authority and direction of the United States Government were null and void."

And the plaintiff thereupon asked damages in the sum of five
99 thousand dollars. The defendant, in his answer, set up, substantially, only two defenses, the first being outlined in paragraph "Third" under the head of "First Defense" and the second in paragraph "Third" under the head of "Second Defense." These two paragraphs are as follows:

"I.

"That he denies each and every other allegation in the said complaint contained, except as hereinafter stated; that true it is that, acting under instructions received from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the 'Laurada' and formally take possession or charge of said vessel, and that he kept her in his custody and under his control for twenty-one days, but this defendant was then informed and verily believes that the said 'Laurada' was about to depart from the United States with arms, munitions of war, and men, constituting a military expedition, and was intended by her owners to commit hostilities upon the subjects and property of the island of Cuba, a colony of the Kingdom of Spain, with which the United States was at peace, and that there was probable cause for such detention of the said vessel."

"II.

"That true it is this defendant, acting under instructions from the Secretary of the Treasury of the United States, caused the steam vessel 'Laurada' to be formally detained by placing an inspector on board. But this defendant alleges that no injury or damage resulted to the plaintiff thereby, the said 'Laurada' then being in the custody of the marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Kerr & Company against the steamship 'Laurada;' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895; and this defendant submits that any damages sustained were by reason of such detention, and did not result from the act of this defendant."

We will consider in disposing of this case here only the last
100 defence, above stated, for it was upon the testimony and facts in relation thereto that the trial judge directed a verdict for the defendant. The facts are substantially as follows: The steamship "Laurada," which was owned by the original plaintiff in this action, W. W. Ker, had anchored in the port of Charleston, South Carolina, and whilst there, on the 15th of November, 1895, John E. Ker and John E. Ker, jr., partners, doing business under the firm name of J. E. Ker & Co., at the city of New York, and at Montego Bay and other places in the island of Jamaica, filed a libel and complaint in the District Court of the United States, at Charleston, against the steamship "Laurada," her engines, boiler, tackle, etc., and against all persons intervening for their interests therein and against Samuel Hughes, the master of the vessel, wherein the said libellants sought to recover damages against the said "Laurada," based upon the alleged violations of the terms of a charter party, set forth in the libel. On the date of the filing of the libel, to wit, the 15th day of November, 1895, a monition and order for attachment was

issued in the name of the President of the United States of America and directed to the marshal of the District of South Carolina, commanding the marshal to attach the said ship or vessel, her tackle, etc., and detain the same in his custody until the further order of the court respecting the same, and give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the libel, and that they be and appear before the court, etc. This monition and order for attachment was signed by the proctors for the libellants, and upon its face appears to have been issued by E. M. Seabrook, clerk District Court of the United States of South Carolina, per Julius Seabrook, deputy clerk, to which was also affixed the seal of the United States District Court of South Carolina.

The testimony which was introduced at the trial, and which was uncontradicted, shows that E. M. Seabrook, the clerk of the United States District Court at Charleston, on the 15th of November, 1895, the date on which this monition and attachment purports to have been issued, was out of the district, in Atlanta, Georgia, attending his father, who was sick, and that Julius Seabrook, a brother of the clerk, and who was deputy clerk, was also on that date in Atlanta with his brother attending the sick father. That the names of
the clerk and the deputy clerk were written by a younger
101 brother by the name of J. D. Seabrook, and the seal which
appears upon the paper was affixed by him. It is further shown that J. D. Seabrook was in the clerk's office at the instance of the deputy, Julius Seabrook. The father being in Atlanta sick, the clerk, E. M. Seabrook, had gone to attend him, and Julius Seabrook, the deputy, was unexpectedly called by his brother to come to Atlanta, and in this situation he asked the other brother, J. D. Seabrook, to stay in the office of the clerk and file papers, if any came in, and the last named, under these circumstances, wrote the names of the clerk and deputy clerk and affixed the seal to this monition and attachment. He had never been appointed or qualified as deputy clerk, and, so far as appears from the record, had not undertaken to act as such in any instance, except in the issuance of the monition and attachment in question.

After some intermediate proceedings in the libel case it came on to be heard on the 5th of December, 1899, when the following decree was entered:

"JOHN E. KER AND COMPANY
"*vs.*
"STEAMSHIP LAURADA. } *Libel in rem.*

"This cause came on to be heard before the District Court of the United States for the District of South Carolina, on the records, pleadings, and proof herein. Whereupon, it is now ordered, adjudged, and decreed that the libel herein be dismissed for want of

jurisdiction of the court in rem in this cause and process herein being void."

It further appears in the record of the libel proceeding that on the 20th of November, 1895, the counsel for the "Laurada" addressed the following letter to George D. Bryan, Collector of Customs, at Charleston, S. C.:

"We are informed that you are detaining the steamer "Laurada" on behalf of the United States. We are desirous that she shall forthwith proceed and, therefore, beg to enquire if she may do so now, as we do not wish to advise in conflict with the instructions of the Government of the United States. We request an early reply."

102 The collector, who is the defendant below and the defendant in error here in the present action, on the same date returned this answer:

"Your favor of this instant at hand and in reply I beg to say that you are correctly informed in that I am detaining the steamer "Laurada" on behalf of the United States. I could not permit her to proceed, as indicated in your letter, as my instructions are to detain her."

At the close of the testimony the trial judge, in response to a request of the counsel for defendant, directed a verdict for the defendant, to which counsel for the plaintiff duly excepted. A judgment was entered against the plaintiff in accordance with the verdict, to which the plaintiff also excepted, and the case is before us upon these exceptions. It is unnecessary, in our opinion, to treat severally of the errors assigned by the plaintiff. It is sufficient to note the legal proposition upon which the court based the decision. We quote from the instructions given by the court the following:

"As a mere question of law it seems to me that the plaintiff has no case, that the ship was not in the possession of the defendant, collector of the port, but was in the possession of the marshal, and it appeared to be lawful process; and if she was in the possession of the marshal then she could not have been in the possession of the defendant (collector) and the defendant (collector), therefore, is not responsible. * * * The simple question here is whether or not the marshal had possession; if the marshal had possession, then the collector did not. Undoubtedly upon the proof, the marshal did have possession of the ship and the Government gets out in that way."

These instructions were severally and duly excepted to by the plaintiff's counsel and the case is before us to determine whether or not there is error.

The collector of the port of Charleston, as has been stated, sent his inspector aboard the "Laurada" the day after the marshal took her in custody, and the possession of the two was simultaneous from that time until the vessel was released by the collector. Thus the sole question is whether the possession of the marshal first obtained

103 protects the collector in this action which is brought against

him by the owner of the ship to recover damages for an alleged trespass. The principles of law in regard to actions of trespass are well settled and the rule is the same, both as to realty and personal property. The person who undertakes to maintain his action must, at the time when the act which constitutes the alleged trespass is committed, either have the actual possession in him of the thing which is the subject of the trespass, or must have a constructive possession in respect to the thing being actually invested in him, with the right to immediate possession. This latter doctrine is well declared in Wilson v. Haley Live Stock Company, 153 U. S., 39, in which the court holds: "A count in trespass de bonis asportatis, for the taking and detaining of personal property, can only be supported on the theory that the plaintiff was either its owner or entitled of right to its possession at the time of the trespass complained of." In the final disposition of this case by the trial court, no question was made as to the ownership of this vessel by the testator of the present plaintiff, nor is there any presented in the arguments or briefs submitted to this court. Then the original plaintiff being the owner, did he at the time have the possession of his vessel, or did he have the right to immediate possession by reason of the wrongful custody of the marshal? In other words, was the marshal there as a trespasser? In disposing of the libel case, as is shown by the decree, which is incorporated above, the court declared that the process therein was void. Counsel for the defendant makes the point that this decree was by consent and was inter alois acta, and that it, therefore, can have no effect upon the present case. So far as the rights of the parties to that particular action are concerned, we admit this position to be true, but this decree is not relied upon in that view here. It is only in support of the position that the process under which the marshal took custody of the vessel was void and, therefore, conferred no authority upon him to take possession of the ship. However, aside from this decree, the facts being admitted as to the circumstances under which the monition and attachment was issued, this court, we think, has the right to determine as to whether or not it was a void process, and in our opinion it was. The person who signed the name of the clerk and the deputy clerk, and affixed the seal of the District Court of South Carolina to the process, had no authority whatever to do these acts. He was not even an
104 officer de facto, and in our view the process which the marshal had and under which he took custody of this vessel had no more legal force and conferred no more legal authority than if it had been issued direct from the office of the proctors, without the intervention of the person who signed it and affixed the seal to it. With this conclusion, it necessarily follows that the custody of the marshal was wrongful. He was aboard the ship, holding it in custody unlawfully. He was a trespasser. The wrongful possession of property by a trespasser does not oust the possession of the right-

ful owner so as to divest the latter of his right to maintain an action against the subsequent unlawful entry of another than the original wrongdoer. In the case of Van Brunt v. Shenck, 11 Johns. (N. Y.), 377, it was held that "where A's vessel is seized by B under the United States internal-revenue laws, and C, with the consent of B, makes use of the vessel, A can not maintain trespass, because B's possession was lawful and A was, therefore, not in possession at the time of C's trespass." This is undoubtedly the law, and if the possession of the "Laurada" by the United States marshal, at the time the collector took possession, had been lawful, we would not hesitate to concur with the trial judge in his ruling that the action of trespass against the collector could not be maintained. But as we have stated above, the possession of the marshal was not lawful and, therefore, the right of property and the immediate right of possession was in the owner. And if the collector took possession unlawfully or wrongfully, the owner can maintain his action against him, and it was error, in our opinion, for the trial court to hold that the possession of the marshal, under the circumstances, protected the collector and deprived the owner of the vessel of this right. We do not intend by this opinion to deprive the defendant of any right to contest the real ownership of the vessel or to set up by way of defence the bona fides of his action in seizing the vessel, the probable cause which may have existed at the time, of any other legal defence. We only decide that the possession of the marshal does not shield the defendant, nor was it a legal ground upon which to direct a verdict against the plaintiff.

The judgment of the District Court of South Carolina is reversed and the case is remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

105 July 28, 1908 (same term), the court made and entered the following judgment, to wit:

Judgment: Filed July 28, 1908.

United States Circuit Court of Appeals, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DEC'D, plaintiff in error, *vs.* GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant in error.	No. 808.

In error to the Circuit Court of the United States for the District of South Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, reversed, and the cause is remanded to the Circuit Court of the United States for the District of South Carolina, at Charleston, with directions to set aside the verdict and grant a new trial in accordance with the views expressed in the opinion of this court. J. C. PRITCHARD.

July 28th, 1908.

Petition to stay mandate.

Filed August 1, 1908.

The United States of America, in the Circuit Court of Appeals, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED, plaintiff in error, *against* GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant in error.	No. 808.

To the Honorable the Judges of said Court:

Your petitioner, Ernest F. Cochran, United States attorney for the district of South Carolina, counsel for George D. Bryan as collector of the port of Charleston, South Carolina, defendant in error in the above-entitled cause, respectfully represents: That the opinion and decree of your honorable court was filed on the 28th day of July, 1908, reversing the judgment of the court below.

That the issues in the said cause involve matters affecting the
107 interests of the United States, and the Department of Justice is desirous to have the mandate of your honorable court withheld until the department has determined the question whether application should be made to the Supreme Court for a writ of certiorari therein.

That the first court to be held in the said District of South Carolina, in which action may be had in said cause, will convene on the first Tuesday in November, 1908, and the interests of the plaintiff in error will not be effected by such withholding of the mandate until that time.

Wherefore your petitioner prays that your honorable court will direct that the mandate in said cause be withheld until the first day of November, 1908.

ERNEST F. COCHRAN,
United States Attorney,
Counsel for Defendant in Error.

Order staying mandate.

Filed August 4, 1908.

The United States of America. In the Circuit Court of Appeals, Fourth Circuit.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED, plaintiff in error,
vs.
GEORGE D. BRYAN, COLLECTOR OF PORT OF CHARLESTON, defendant in error.
} No. 808.

In the above-entitled cause it is ordered that the mandate be stayed until the 3rd day of November, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge, Presiding.

August 4, 1908.

Clerk's certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

109

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 3rd day of October, A. D. 1908.

[SEAL.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

By CLAUDE M. DEAN,
Deputy Clerk.

110 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 3rd day of November, 1908, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified copy of the transcript of the record therein now on file in the office of the clerk of the Supreme Court of the United States shall be taken as the return to the writ of certiorari.

In tesimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 9th day of November, A. D. 1908.

[SEAL.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

111 In the Supreme Court of the United States.

October Term, 1908.

GEORGE D. BRYAN, AS COLLECTOR OF THE PORT OF Charleston, petitioner,
v.
ROXANA S. KER, EXECUTRIX OF W. W. KER, deceased.
} No. 584.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the return of the clerk of the Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
J. P. K. BRYAN,
Counsel for Respondent.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed November 9th, 1908, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 9th day of November, A. D. 1908.

[SEAL.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

112 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Fourth Circuit, greeting:

Being informed that there is now pending before you a suit in which Roxana S. Ker, executrix of W. W. Ker, deceased, is plaintiff in error and George D. Bryan, collector of the port of Charleston, is defendant in error, which suit was removed into the said Circuit

Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of South Carolina, and we, being willing for certain reason that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States.

113 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of November, in the year of our Lord one thousand nine hundred eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

114 (Indorsed:) File No. 21380. Supreme Court of the United States. No. 584, October term, 1908. George D. Bryan, collector, &c., *vs.* Roxana S. Ker, executrix, &c. Writ of certiorari. The execution of the within writ appears from the schedules thereto attached. Henry T. Meloney, clk. U. S. Cir. Ct. Appeals, 4th Circuit. Office of the clerk Supreme Court U. S. Received Nov. 12, 1908.

115 (Indorsed:) File No. 21380. Supreme Court U. S. October Term, 1909. Term No. 273. George D. Bryan, collector, &c., *vs.* Roxana S. Ker, executrix, &c. Writ of certiorari and return. Filed Nov. 12th, 1908.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

GEORGE D. BRYAN, AS COLLECTOR OF the port of Charleston, petitioner,
v.
ROXANA S. KER, EXECUTRIX OF W. W. Ker, deceased.
} No. ——

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF.

The Solicitor-General, on behalf of the petitioner, respectfully prays for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit in the above-entitled cause, reversing a judgment of the United States Circuit Court for the District of South Carolina.

This was an action brought in 1896 in the Circuit Court for the District of South Carolina originally by William W. Ker against George D. Bryan, as collector of the port of Charleston, for damages in the sum of $5,000 for the alleged seizure and detention of the steamship *Laurada*, which was owned by Ker. The principal facts, as shown by the record, are as follows:

On November 15, 1895, the *Laurada* was seized by the United States marshal under a monition and attachment issued from the District Court in a libel

proceeding brought against the vessel by John E. Ker & Co. (Rec., pp. 30, 62, 63.) The monition, which was under the seal of the court, bearing *teste* of the district judge, was apparently signed by the clerk, by his deputy, and appeared perfectly regular. The libel was dismissed on December 5, 1899, and the Marshal retained custody of the *Laurada*, until December 18, when the vessel was released by order of the court upon giving bond (Rec. pp. 28, 30, 66–68).

On the day after the marshal took charge of the *Laurada* the collector, acting under instructions from the Treasury Department to detain the vessel, which was believed to have landed in Cuba a filibustering expedition from the United States, put an inspector on board, who continued on the vessel until withdrawn on December 6, 1895. During all that period the *Laurada* remained in possession of the marshal, who had a deputy on board, and neither the collector nor his inspector interfered with or disturbed the possession of the marshal (pp. 3, 29, 30, 31, 34).

The suit against the collector, which at first was not pressed, was tried in December, 1907, before United States Judge Brawley and a jury. The court instructed the jury to bring in a verdict for the defendant upon the ground that the vessel was not in the possession of the collector, but was in the possession of the marshal, and the collector therefore was not responsible (p. 82). On writ of error the Circuit Court of Appeals (Boyd, district judge) reversed the judgment, holding that the process under which the marshal took custody of the vessel

was void, and therefore conferred no authority upon him to take possession; that he was therefore a trespasser, and the right of possession of the vessel was in the owner, who could maintain an action for damages against the collector.

It is submitted that the learned judge's views are in conflict with those heretofore expressed by this court in cases involving similar questions, and that the decision should not be allowed to stand.

The process under which the marshal took custody of the vessel, and which the Court of Appeals held to be void, was under the seal of the District Court, apparently bore the signature of the clerk of the court written by his deputy, and was perfectly regular on its face (p. 62). There was nothing in the record of the libel proceeding in which the attachment was issued to show that the monition was not signed by the deputy clerk as it appeared on its face to be. At the trial of the present case in the Circuit Court, however, evidence was offered by the plaintiff to show that at the time the monition was issued the clerk and deputy clerk, owing to the illness of the former, were both absent from the city, and that the signature to the monition—"E. M. Seabrook, C. D. C. U. S. S. C., per Julius Seabrook, Dep. Clk."—was made by the brother of the deputy clerk, J. D. Seabrook, whom he had left in charge of the clerk's office, with instructions to receive and file papers and issue any writs that were necessary, signing the clerk's name to them (pp. 39, 40, 41).

It is well settled by the decisions of this court that when a writ is in the hands of an officer, under the seal of the court, and with every appearance of regularity on its face, he is bound to obey it, and if he seizes property in obedience to such writ, he is protected for that act. In the leading case of *Matthews v. Densmore*, 109 U. S., 216, where goods had been seized by the marshal under a writ of attachment issued on a defective affidavit, this court said, referring to the refusal of the state court to permit the marshal to prove that the property belonged to the defendant in the attachment and was lawfully seized under the writ (p. 219):

> The ground of this ruling is that because there is a defect in the affidavit on which the attachment issued, that writ is absolutely void, and the officer who faithfully executed its commands stands naked before his adversary as a willful trespasser.
>
> It would seem that the mandatory process of a court of general jurisdiction, with authority to issue such a process and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the court and are within its jurisdiction, can not be absolutely void by reason of errors or mistakes in the preliminary acts which precede its issue.
>
> It may be voidable. It may be avoided by proper proceedings in that court. *But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on*

its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts.

The above language was quoted and relied upon in *Marks* v. *Shoup*, 181 U. S., 562, where a similar point was under consideration.

In *Matthews* v. *Densmore* the court quoted with approval from the decision in *Cooper* v. *Reynolds*, 10 Wall., 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment, and said that decision was conclusive in the Federal courts in regard to the validity of their own process when collaterally assailed. In that case the court, discussing the nature of the jurisdiction in attachment cases, said (p. 319):

> It seems to us that the seizure of the property, or * * * the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem*. * * * The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities, but the writ being issued and levied the affidavit has served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can

deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property.

These views were generally applied in the case of *Conner* v. *Long*, 104 U. S., 228, where it was held that even when, by reason of bankruptcy proceedings the jurisdiction of the court was ousted when its order to sell in an attachment suit was issued, the sheriff, not having prior notice, was protected against the consequences of executing the order, and was not liable in an action brought by the assignee for wrongful conversion of the property sold.

Among the authorities cited in *Connor* v. *Long* upon which the court based its conclusion is *Buck* v. *Colbath*, 3 Wall., 334, in which the court said, referring to a certain class of writs including the process of admiralty courts, that in respect to such writs the officer executing them "has no discretion to use, no judgment to exercise, no duty to perform, but to seize the property described." And in *Connor* v. *Long* the court, referring to purchasers at sales, said: "The maxim to which they are subject is '*caveat emptor*.' It is not so with the sheriff, who, as a public officer of the court, obeys its precepts, regular on their face, without notice of any want or failure of jurisdiction; he is not at liberty to exercise any discretion and has no choice but to obey (104 U. S., at p. 240)."

The rule that it is enough for the officer's protection from liability for trespass if the process is regular on its face, though there may have been some irregu-

larity in issuing it, is established in England (*Rex* v. *Danser*, 6 T. R., 242), and there are innumerable State decisions to that effect. See, among others—

Donahue v. *Shed*, 8 Met., 326;
Billings v. *Russell*, 23 Pa. St., 189;
Putnam v. *Man*, 3 Wend., 202;
Earl v. *Camp*, 16 Wend., 562;
Deyo v. *Van Valkenburgh*, 5 Hill, 242;
Wilton Mfg. Co. v. *Butler*, 34 Me., 431;
Bogert v. *Phelps*, 14 Wis., 88.

Again, it is submitted that the Circuit Court of Appeals was in error in holding that the writ was absolutely *void*, rather than merely *voidable*. Such defects in a writ as that under consideration in this case do not make the process void, but the informality may be cured by amendment, if the paper bears internal evidence of its official origin and of the purpose for which it was issued, or the writ may be avoided by proper proceedings brought for that purpose. So, where a clerk issued a summons in the usual form, attested by his official seal, but not subscribed, the court held that it had the power to amend by allowing the clerk to sign his name (*Redmond* v. *Mullenax*, 113 N. C., 505); and where a writ issued by a justice of the peace was not signed by him, but the signature was written by the plaintiff's attorney who had been authorized by the justice generally to sign writs, it was held such writs are only "voidable as to all persons who choose to take exception in a proper time and manner, but they are not absolutely void so as to be incapable of confirmation." (*Nichols* v. *Smith*, 26 N. H., 298, citing many authorities.)

The distinction between the two terms *void* and *voidable* is clearly and ably pointed out in the case of *Ambler* v. *Leach*, 15 W. Va., 666, where the court remarks upon the loose and inaccurate use of the words, and gives illustrations of their meaning taken from the reports. Concerning voidable process it is said (p. 685):

> As an example of proceedings of a court which are properly speaking voidable, we may refer to the cases where the process is defective, or is not properly returned. They are frequently treated as valid and effectual, until they are avoided by some act of the defendant. They are *prima facie* valid, but they are subject to defects, and the defendant may by proper proceedings defeat and destroy them.

The writ in that case was not signed by the clerk, and its date was blank, but the court held that it was not absolutely null and void because of these defects, but was voidable and might have been avoided by motion to quash, and that since not so avoided, the judgment rendered thereon was valid and binding. After reviewing many authorities on the question of what will render a writ void or merely voidable, the court concludes (p. 692):

> The decided weight of authority is against holding a writ absolutely void, *because not signed by the clerk*, or not having the seal of the court attached to it, or not being properly attached, or for not running in the name of the State, even where these things, or any of them, are required in the Constitution; but such defects in a writ render it only voidable.

The opinion in *Ambler* v. *Leach* is very carefully considered and exhaustive, and it is clear from the reasoning of the court that the attachment and monition in the *Laurada* libel proceeding was not void, but only voidable, and that the marshal would not be a trespasser until the writ had been set aside in proceedings brought for that purpose, and would then be a trespasser only if he continued to hold possession after the setting aside of the writ.

This is an important question. If the decision of the Circuit Court of Appeals is allowed to stand, it will be taken as a precedent, at least in the Fourth Circuit, and will prove a serious hindrance to marshals in executing process. If an officer is required for his protection, whenever a writ is put in his hands, to ascertain that it is without defect and regular in actual fact, when it has every appearance on its face of being so, then execution of process will be seriously delayed and the administration of law and justice unwarrantably hindered and obstructed.

It is respectfully submitted that the writ of certiorari should issue.

HENRY M. HOYT,
Solicitor-General.

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[redacted] [redacted]

Reply

REPLY BRIEF FOR PLAINTIFF IN ERROR.

UNITED STATES CIRCUIT COURT OF APPEAL

FOURTH CIRCUIT.

NO. 808.

ROXANA S. KER, AS EXECUTRIX

Plaintiff in Error.

vs.

GEORGE D. BRYAN, COLLECTOR,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina at Charleston.

ARGUMENT IN REPLY FOR PLAINTIFF IN ERROR.

M. C. BUTLER,
J. P. K. BRYAN,

Counsel for Plaintiff in Error.

UNITED STATES CIRCUIT COURT OF APPEAL.

FOURTH CIRCUIT.

NO. 808.

ROXANA S. KER, AS EXECUTRIX

Plaintiff in Error.

vs.

GEORGE D. BRYAN, COLLECTOR,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina at Charleston.

ARGUMENT IN REPLY FOR PLAINTIFF IN ERROR.

M. C. BUTLER,
J. P. K. BRYAN,

Counsel for Plaintiff in Error.

In view of the positions taken by the defendant in error, it is proper that a reply be made to the same.

The position of the defendant in error in this case is no attempt whatsoever of legal justification of the act of the Collector. The wrong of the Collector stands admitted. The effort is to avoid the effect of the wrong, of the detention by the Collector, by reason of the alleged official custody of the United States Marshal, which we have shown by the evidence to be under a void process, and independently, issued in a cause in a Court having no jurisdiction, by its own decree, of the cause and pronouncing the process void.

I.

THE PROCESS—WARRANT OF ARREST—ON WHICH THE MARSHAL HELD "LAURADA" WAS VOID.

The Defendant in error has in his argument confused void and voidable process. Void process is that which is issued without authority of law. Voidable process is issued by authority of law, but some defect or irregularity exists in same preliminary step or formal particular. Defendant in error cites only cases of voidable process—but if we examine the Statutes of United States and the decisions of its Courts this warrant of arrest was issued without authority of law, it was no legal warrant, and void.

In *Benedict's Admiralty*, page 231, the official nature of the issue of process is stated as follows:

"The issuing of the process being the *act of the Clerk*, the party or his Proctor is not responsible for its imperfections." (Page 231.)

If the issuing of process is the "act of the Clerk," then the Clerk *not* issuing the process, and *not* having signed or sealed the same, there is no legal process. There is no legal writ, the Court has not acted.

The warrant is void unless signed by the officer.

"Hawkins, P. C. bk. 2, c. 13 § 21, follows Lord Hale in stating the necessity of the seal to a warrant of a justice of the peace, but what Lord Hale says is this (1 Hale, P. C. 577): "It must be under seal, though some have thought

it *sufficient to be in writing, subscribed by the justice;*" and he refers to Dalton's justice, wherein it is laid down that 'their warrant or precept in writing should be under *their hand* and seal, or *under their hand at least.*" First ed. 1680, 287." *Starr v. United States*, 153 *U. S., pp.* 617, 618.

"Blackstone states that the "Warrant ought to be under *the hand* and seal of the justice," (4 Bl. Com. 290.) but Chitty's note on that passage is that "it seems sufficient if it be *in writing and signed by him*, unless a seal is expressly required by a particular act of Parliament," citing Willes, 411; Buller, N. P., 83. And this is repeated in 1 Chitty Crim. Law, 38."

Idem p. 618.

See also State v. Vaughn, Harper (S. C.) 313; Davis v. Sanders, 40 S. C., 507.

The summons not being signed by the Clerk or the Deputy Clerk, but by a private, unofficial person is void.

Sec. 911. Rev. Stat. U. S.:

"In the United States Courts, a summons must issue from the Court, and be signed by the Clerk, and sealed with the seal of the Court.

"In those Courts a summons cannot be amended by the subsequent addition of the signature of the Clerk, and the seal of the Court."

Dwight v. Merritt, 4 *Fed. Rep.* 614.

The Court say:

"That power is power to amend a defect in process, and power to amend a want of form in process. But there must first be a process to be amended. There must be something to amend, and to amend by. This paper is no process."

Idem, 616. (By Blatchford, J. Circuit Ct. N. Y.)

In *Jewett v. Garrett*, 47 Fed. Rep. 625, the Court say:

"To give such a drafted paper, in form a writ, efficient power to compel the appearance 'in the forum chosen' of the defendant named in it, it must be dignified by the seal of the Court, and attested by the signature of the Clerk. These ad-

ded to the drafted form transform the invalid paper into a vitalized writ of the Court. The only *official acts* of the Clerk as to process required by statute are the affixing of the seal of the Court and the *signing* of the writ itself" (page 627).

In *Deas vs. The Berkeley*, 58 Fed. Rep., 920 (Simonton J.), previously cited, the writ was in violation of the Rule of Court, and was held a void warrant.

In the case at bar, the warrant of arrest is issued in violation of the statute, a fortiori it is void.

In the case of *Middleton Paper Company v. the Rock River Paper Co.*, 19 Fed Rep. 252, the Court held as follows:

"Federal Court Practice—Processes—How Issued.

"All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, and shall be signed by the Clerk thereof."

"Same—Summons Issued by the Attorney—Amendment.

"A process which has been issued by the attorney when it should have been issued by the Clerk is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons the Court gets *no jurisdiction* of the case, and there is nothing to amend."

The Court say:

"The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into Court and answer, litigate his rights, and submit to the personal judgment of the Court, must be '*Process* within the meaning of the law of Congress', and the rule of the Court * * *. And this makes the practice in this Court consistent and uniform. There would be no consistency in requiring the summons, by which the action is begun, to be issued from the Court and allow the garnishee summons to be issued by the attorney. It is no doubt the policy of the law to keep process under the immediate supervision and control of the Court."

"If *the Clerk* had issued the summons and failed to seal it, the Court could order it sealed. But no process, regular or irregular, has been issued by the *proper authority*. Hence it

is that the Court gets no jurisdiction of the case, and there is nothing to amend by."

Idem, pp. 253-254.

"A warrant in Admiralty, signed merely by the Judge without the *signature of the Clerk* and seal of the Court, is void."

Bowler v. Elbridge, 18 Conn. 1.

"A paper purporting to be a *venire facias* tested in the name of the Deputy Clerk, is void.

U. S. v. Antz, 16 Fed. Rep., 119.

(See also Wells v. McGregor, 13 Wall. 188.)

In *Shepard v. Adams*, 168 U. S., the Supreme Court of the United States held that if the "Court below never acquired jurisdiction over the defendant by a *valid service* of process, in such a case there would be an *entire* want of jurisdiction." (pp. 618, 623.)

In the *Confiscation Cases*, 20 Wall, 93, 111, the Supreme Court stated the statutory requisition as follows:

"Another objection urged against the proceedings in the District Court is, that the warrant, citation, and monition was not *signed by the Clerk* of the Court. It was attested by the Judge, sealed with the seal of the Court, and signed by the Deputy Clerk. This was sufficient. An Act of Congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do."

In that case, the signature of the deputy Clerk sufficed; but here there was no official act by any officer giving this paper to the Marshal. Neither the Clerk or his Deputy signed.

In *Leas & McVitty*, 132 Fed. Rep. 511, the Court say:

"In *Middleton Paper Co. v. Rock River Paper Co.* (C. C.) 19 Fed. 252, the State statute of Wisconsin provided for

garnishee process to be issued by plaintiff's Attorney. It was held that in the Federal Court of that State this paper must be issued by the *Clerk* of the Court under his hand and the seal of the Court." (p. 511.)

"I think 911, Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a Federal Court it *must be signed by the Clerk*, and shall be authenticated in the manner therein set out." (p. 512.)

(Circuit Court of West Va., Judge McDowell.)

It was decided in the *United States vs. The American Lumber Co., 80 Fed. Rep.* 313, "in a process served in violation of the statute, no jurisdiction is obtained, and the same is null and void."

The State Court cases are to same effect:

"It is essential to a writ that it be signed by the Clerk."
Powers v. Swigart, 8 Ark. (3 Eng.) 363;
Smith v. Affanassieffe, 2 Rich. Law, 334.

"A paper purporting to be a summons which is not signed by the Clerk of the District Court is invalid."
Lindsay v. Kearny County Com'rs. 56 Kan. 630. 44 Pac. 603.

"All process should be signed by the principal clerk, either by himself individually, or by his deputy signing it and then his own name as deputy."
Felder v. Meredith, 1 Miss. (Walk) 447.

"A writ signed by an attorney under a verbal authority of the clerk is a nullity."
Gardner v. Lane, 14 N. C. 53.

"Where a writ is signed by an attorney under a verbal authority of the clerk, its subsequent ratification by him will not render it valid."
Gardner v. Lane, 14 N. C. 53.

II.

THE "LAURADA" NOT IN CUSTODY OF THE LAW.

The authorities quoted by the defendant in error at page 7 of his Brief, that the vessel *"was in the custody of the law"* when the Marshal's Guard was aboard of her with a void process, instead of helping the defendant in error, emphasizes our contention. If we examine the authorities quoted by him, we will find:

The case of *Freeman vs. Howe*, 24 *How.*, 454, in which the Supreme Court say:

"To give jurisdiction to the District Court in a proceeding *in rem*, there must be a *valid seizure* and an actual control of the *res* under the process."

And in the same case, at page 456, the Supreme Court say:

"In the case of a proceeding *in rem* in admiralty, *the lien or charge which gives the right to seize the property*, results from the principles of the maritime law."

In Covell v. Heyman, 111 U. S., 176, the Supreme Court quotes again the above passage, to-wit:

"To give jurisdiction to the District Court in a proceeding *in rem*, there must be a *valid seizure*, and an actual control of the *res* under the process." (p. 177.)

In the case of *Buck v. Colbath*, 3 *Wallace*, 334, the Court say:

"It follows from this, as a rule of law of universal applications, that if the Court issuing the process *had jurisdiction in the case before it to issue that process, and it was a VALID PROCESS when placed in the officer's hands*, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the Court which issued it, but in all other Courts." (p. 343.)

It is clear, therefore, that before the Marshal can claim protection, the Court issuing the process must have jurisdiction in the case before it to issue that process, and it was a VALID PROCESS when placed in the officer's hands.

In the case at bar, it appears that the Court had no jurisdiction to issue that process, for it so decreed, and it further appears that the process when placed in the officer's hands was not a valid process but a void process, as the Court decreed, being not issued by the Clerk or his Deputy, but was the act of a private, unofficial person, and which also independently appeared in the evidence in the Court below.

In the case of *Buck vs. Colbath*, moreover, the Court, although they held the property within the custody of the Court, so as to prevent any other Court from interfering with it, nevertheless did not relieve the Marshal from an action of trespass, for the Court say:

"It is obvious that the action of trespass against the Marshal in the case before us, does not interfere with the principle thus laid down and limited." (p. 342.)

The writ must be issued by *competent* authority; else it is void.

"Obedience to all precepts committed to him to be served is the first, second and third part of his duty; and hence, if *they issue from competent authority*, and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command."

Conner v. Long, 104 U. S., p. 238.

In the case of *White v. Schloerb*, 178 U. S., 542, 548, the principle announced in that case was that the District Court had authority to restore property in bankruptcy which had been forcibly and unlawfully seized and taken out of the judicial custody of that Court "*property which had lawfully come into its possession.*

Here, however, the Marshal was acting under a void writ, and the property had not lawfully came into his possession.

Finally in the case of the *Resolute* 168 U. S., 437 (cited by Deft. in error) the Court say:

"In order for the Court to have jurisdiction, there "must be a martime contract and that the property pro- "ceeded against is within the *lawful custody* of the "Court."

The writ being void the custody was therefore unlawful and there was no jurisdiction of the res.

No "attachment can issue from a Circuit Court of the United States in an action against a national bank before final judgment in the cause; and if such an attachment is made on mesne process, and is then dissolved by means of a bond with sureties conditioned to pay to plaintiff the judgment which he may recover, given in accordance with provisions of the law of the State in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff."

Pacific Nat. Bank vs. Mixter, 124 U. S., p. 721.

"We are therefore, of opinion that the *attachments in all the suits were illegal and void because issued without any authority of law.*"

Idem, p. 728.

"In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal, and therefore, a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment * * * such being the case, it necessarily follows that if there was no *authority in law for the attachment*, there could be none for taking the bond. If the attachment is illegal and therefore void, so, also must be the bond which takes its place."

Idem, pp. 728-729.

In *Insurance Company vs. Hallock*, 6 Wall, p. 556, the Supreme Court held:

"That the statutory pre-requisite of signing and sealing the writ if not complied with, made the writ of no authority and all the acts of the Sheriff under it void." The Court say: "This is his authority, and if it is for any reason void his acts purporting to be done under it are also void."

Idem. 561.

"IRREGULARITY AND VOIDABLE PROCESS.—A process which is *irregular* or *voidable* only and not void affords full protection to the Sheriff who obeys its mandate, for the Sheriff is a ministerial officer in the execution of writs, and is not bound to examine into their legality."

25 Vol. Am. & Eng. Ency. of Law, 2nd Ed. p. 699.

In the case of *Matthews* v. *Densmore*, 109 U. S., 216, the Court held that a writ is not absolutely void by reason of errors or mistakes in the *preliminary* acts which precede its issue; that it is voidable. But there is no error or mistake in any preliminary act that precedes the issue of the warrant in this case.

There is a total lack of power here to issue the writ in the absence of the Clerk and the Deputy Clerk. The issuance itself is void, and the signature was by a private unofficial person with a total lack of power.

In the case of *Cooper vs. Reynolds*, 77 U. S., 308, cited by the defendant in error, the Court recognizes this principle, and useses these words: p. 13, Brief Defendant in error:

"If the writ of attachment is the *lawful writ* of the Court, issued in proper form under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into Court, the power of the Court over the *res is* established. The affidavit is preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities."

In this case at bar there is no *lawful writ*, the condition of the acquiring of jurisdiction over the *res*. It is not a question of defective process by reason of the omission of some formality in some preliminary. The writ itself is not lawful because of a total want of power to issue the writ by the person issuing it.

In the case of *Wehrman* v. *Conklin*, 155 U. S., 314, the Court held that the writ of sale was not void on a demurrer setting up among other things, "that that writ of attachment was not attested by the seal of the Court." (p. 315.)

The Court held "That the absence of the seal did not invalidate the writ." (315.)

The facts in that case were:

"The County offices being evidently not yet in a compiete working condition, the Clerk affixed an ordinary private seal or scroll to the writ, with a statement that no seal had yet been procured." (p. 330.)

The clerk however signed the writ in that case and its issuance was his official act. Here there was no official act..

"If a writ be in legal form and issued by *an official having legal authority to issue it*, it will justify the officer in attaching the defendant's property, whether the preliminary steps for obtaining the writ have been correctly taken or not."

Ency. P. & Pr. Vol. III, p. 57.

"When the rule has not been changed by statute it is essential to the validity of the writ that it be *signed* by the officer issuing it."

Idem. 57.

"VOID PROCESS.—Void process furnishes no protection."

Bond v. Wilder, 16 Vt. 393;

Mecartney v. Smith, 10 Kan. App. 580.

"Either to the officer or to the plaintiff directing or ratifying the same."

Howell v. Caryl., 50 Mo. App. 440.

VOID FOR WANT OF JURISDICTION.—"An officer serving process void from want of jurisdiction is liable in trespass; it affords him no protection."

Huddleton v. Spear, 8 Ark. 406;

Lafon v. Dufrocq, 9 La. Ann. 350;

Guernin v. Hunt, 477;

Tobin v. Addison, 2 Strobb. L. (S. Car.) 3.

See also Franken v. Trimble, 5 Pa. St. 520.

The conclusion of the whole matter under all the authorities is:

If the officer had power to issue the writ, there would be protection, but if the *officer* had no power to issue the writ, there would be no protection. Where there is a want of power, there is no protection. If there is power to issue the writ, and there is a defect or irregularity, the writ is voidable. If there is no power, as here the writ is void, and there is no protection.

III.

Again, the marshal did not receive the warrant from the clerk or the deputy clerk, the only official who could legally act and issue it to him. The signature moreover was not that of the clerk or the deputy clerk, and he had therefore notice that it was not regular on its face, even if this notice be necessary. He was charged by law with notice that the clerk and the deputy clerk were the only officials that could legally issue the warrant and also charged by law with notice that they could not delegate their official statutory power; in the same way as the Judge himself could not ask his brother to act for him as Judge.

The Supreme Court in *Whitside* v. *U. S.*, 93 U. S., 257, say:

> "Individuals as well as Courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act" (and cases cited).

In any aspect therefore there is no custody of law by the Marshal of the "Laurada" under the void warrant.

IV.

Even if the marshal could claim any protection, the Defendant Collector could not escape liability for his wrong.

Protection Personal to Officer.—The rule of exemption from liability is intended only for the protection of the officer, and is *personal to him.* It does not protect others, or impart validity to a levy made under *void* process."

> 25 Am. & Eng. Ency. Law, 2 Ed. 700.
> Meyer v. Hearst, 75 Ala. 390.
> People v. Whitehead, 90 Ill. App. 614.
> Housh v. People, 75 Ill., 487.
> Earl v. Camp, 16 Wend. (N. Y.) 562.
> Horton v. Hendershot, 1 Hill (N. Y.), 118.
> ~~See also Clement v. Courtright, 9 Pa. Sup. Ct. 45.~~
> ~~Clark v. Norton, 6 Minn. 412.~~

Under this principle, the seizure and custody of the Marshal is wholly invalid, and while in this view, the Marshal may be protected, the seizure is void; his custody is void, and his acts are wholly unofficial when invoked as a protection by others.

In this case it may be granted for sake of argument that the Marshal may not be liable, and yet because he may not be liable, still his custody would not be the custody of the law, and that being set up by other persons, it would not protect other persons from their own trespasses.

So, in this case, the Defendent Collector himself, having no legal authority for his own act, cannot claim any exemption of personal liability on the part of the Marshal proceeding under a void warrant, as a reason for the discharge of his own liability.

V.

That the Admiralty Court had no jurisdiction in Kerr & Co. v. Laurada also appears independent of the Decree.

The authorities quoted by the libellant show that "in order for the Court to have jurisdiction, there must be a *maritime* contract, and that the property proceeded against is within the *lawful custody* of the Court."

The Resolute, 168 U. S., 437.

We have already shown that the vessel was not in the "law ful custody" of the Court, the process being void. It also appears on the face of this libel in Admiralty that the Court had no jurisdiction. A full examination of *The Resolute* and other cases shew this..

In that case the libel was for seamen's wages, which always has been an acknowledged case of admirality jurisdiction. The Court say in that case:

> "The contention of libellant is that, as a maritime lien is the sole foundation of a proceeding *in rem*, such facts must be averred as to show that a lien arose in the particular case; or, at least, that if the libel shows that a lien could not have existed, it should be dismissed for want of jurisdiction. The averment relied upon in this

libel is that the vessel was at the time the services were rendered in the hands of a receiver appointed by a State Court. This fact, however, is not absolutely inconsistent with a lien *in rem* for seamen's wages. *Paxton v. Cunningham*, 63 Fed. Rep. 132. It may have been expressly bargained for by the receiver, it may be implied from the peculiar circumstances under which the services were rendered, or it might be held to have arisen from the peremptory language of the statute, Rev. Stat. § 4535, that "no seaman shall, by any agreement other than is provided by this title, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled, and every stipulation in any agreement inconsistent with any provision of this title . . . shall be wholly inoperative." *Prima facie*, the rendition of mariner's services imports a lien, and the mere fact that the vessel is navigated by a receiver does not necessarily negative such lien, although there may be facts in the particular case to show that the above statute does not apply, or that credit was expressly given to the owner, to the charterer or to some third person. In fact, the question of lien or no lien is not one of jurisdiction, but of merits." (p. 440.)

The Court, therefore, determined that the libel on its face did not show there was no lien. *In that particular case*, of seaman's wages—being a subject matter of admirallty jurisdiction the question of lien or no lien was not one of jurisdiction, but was one of merits.

And so in all cases referred to by the Court, of collision or of material men, or of salvage, in the same way as the case of seamen's wages, a question of lien or no lien depending upon the facts of service rendered, is not a matter of jurisdiction, but a matter of merits, which the Court has the power to try, because in all of these cases the Court has jurisdiction of the subject matter, as has been always held.

But this case does not overrule the decided cases or affect the established doctrine that when the subject-matter on its face does not constitute a maritime contract or tort and cannot under any circumstances give a lien, that the Admiralty is without jurisdiction to arrest the vessel.

"The Court of Admiralty cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews v. Essex Ins. Co.,* 3 Mason, 66, 16; or declare or enforce a trust or an equitable title. *Ward v. Thompson,* 22 How. 330; *The Amelia,* 6 Ben., 475; *Kellum v. Emerson,* 2 Curtis,79; or exercise jurisdiction in matters of account merely. *Grant v. Poillon,* 20 How. 162 *Minturn v. Maynard,* 17 How. 477; *The Ocean Belle,* 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart v. The John Jay,* 17 How. 399. The jurisdiction embraces all maritime contracts, torts, injuries or offences, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching right, and duties appertaining to commerce and navigation. *People's Ferry Co. v. Beers,* 20 How. 393, 401. There was nothing maritime about the claims of the intervenors, and the intervention was properly dismissed for want of jurisdiction over the subject-matter."

The Eclipse, 135 U. S., p. 608.

"The contract for building a ship is not a maritime contract, and a lien to secure it, though given by the local statute, is not a maritime lien, and the United States Court has no jurisdiction *in rem.*"

The Jefferson, 20 Howard, 393.
The Capitol, 20 Howard, 129.
The Edwards vs. Elliott, 21 Wall. 532.

In all of these cases the jurisdiction is put upon the ground that it is not a maritime lien, which is the basis and right to proceed *in rem,* without which the Court has no jurisdiction.

In the case of *The J. E. Rumbell,* 148 *U. S., p.* 11, the Supreme Court say:

"A maritime line, unlike a lien at common law, may", said Mr. Justice Field, speaking for this Court, "exist without possession of the thing upon which it is asserted,

> either actual or constructive. It confers, however, upon its holder such a right in the thing, that he may subject it to condemnation and sale to satisfy his claim or damages." "The only object of the proceedings *in rem* is to make this right, where it exists available—to carry it into effect. It subserves no other purpose." The Rock Island Bridge, 6 Wall. 213, 215. And in The Lottawanna, Mr. Justice Bradley, speaking of a lien given by a statute of Louisiana for repairs and supplies, said "a lien is a right of property, and not a *mere matter of procedure.*" 21 Wall, 558, 579."

Again in the *Corsair*, 145, U. S. 335, 348, the Court say:

> "There is no intimation of a lien or privilege upon the offending thing, which as we have already held, is necessary to give a Court of Admiralty *jurisdiction* to proceed *in rem.*"

This opinion was delivered by Judge Brown, who wrote opinion in the *Resolute.*

In the case of *Cutler v. Rae*, 7 How., 729, the Supreme Court say:

> "The Court of Admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law. (p. 731.)

And in that case, on the ground that there was no lien in a case of General Average, the Court said:

> "That this case in its principles is nothing more than a *common law action.*" (p. 732.)
> "And is not within the Admiralty jurisdiction", and libel dismissed." (p. 732.)

In the case of the Rock Island Bridge, 6 Wall, 215, the Court held that where there was no maritime lien, there was no jurisdiction in rem.

> "A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the

thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wheresoever that goes, and into whosesoever hands it may pass. The *only object* of the proceeding *in rem*, is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose.

"The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of *The Bold Buccleugh*, 7 Moore, 284, "A maritime lien," says that Court, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

This doctrine, as announced by the Supreme Court has been reaffirmed, as we have seen above, repeatedly, but has never been overruled to this day.

Under it the proceeding *in rem* does not exist without a maritime lien, and when there is no maritime lien, it cannot exist, and the Court has no jurisdiction of the subject-matter.

The case particularly in point, sustaining our contention that the admiralty Court had no jurisdiction of the libel in *Vandewater v. Mills*. The Court held:

"Maritime liens are *stricta juris*, and will not be extended by construction."

Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel.

"The obligation between ship and cargo is mutual and reciprocal, and does not take place till the cargo is on board."

Vandewater v. Mills, 19 How., 82. (Rubric.)

"If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his *personal action* for damages, as in other cases."

Idem. p. 90.

"We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject-matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference, for the sake of giving the libellant this remedy, and *sustaining our jurisdiction.* But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction."

Idem, p. 91.

"Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made and a *cargo shipped* under it."

Schr. Freeman v. Buckingham et al, 18 Howard, 188.

Mr. Justice Davis in the opinion of the court in the case of *The Lady Franklin*, 8 *Wall*, 325-329, says:

"The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until

> the cargo is on board, or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to reiterate it, or the principles which lie at its foundation."

And, again, in an opinion by Mr. Justice Davis, in the case of The *Keokuk*, 9 *Wall*, 517-519, he reiterates:

> "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on the vessel, as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it. The Freeman v. Buckingham, 18 How. 188."

In the case of the William Fletcher, 8 Benedict, 537, 29 Fed. Cas., p. 1298, Judge Blatchford on the same point held:

> "That a breach of the contract created no lien on a vessel enforcible in the Admiralty."

The exact point made in the case was "that the facts alleged in the libel created no lien upon the vessel enforcible in Admiralty, therefore, this court has no jurisdiction of the *subject-matter* of this action."

In the case of Boutin vs. Rudd, 82 Fed. Rep., 685, District Court quoted by the Defendant counsel, was a suit *in personam*, and the court there held: "The existence of Admiralty jurisdiction in a suit *in personam* is not dependent upon the existence of the right to proceed in rem." (p. 526.)

And further held, "the Admiralty, therefore, has jurisdiction *at least in personam.*"

But they did not hold that they had jurisdiction *in rem*, for a breach of an executory maritime contract, which gave no lien, on the contrary, the Court say:

> "A proceeding *in personam* is not ancillary to a proceeding *in rem*, the one is to enforce a right growing out of a maritime transaction; the other, to assert a right

against the vessel as a *jus in re*—a proprietary right, claim or privilege in the thing itself." (p. 528.)

In the case at bar, which was an action *in rem*, is without any jurisdiction of the Court.

In the case *in re Cooper*, 143 *U. S.*, 473, the Court held:

"If want of jurisdiction appear upon the face of the proceedings they would prohibit."

In this case the want of jurisdiction appears upon the face of the proceeding under the authority of The Yankee Blade and Vandewater vs. Mills, in which cases no cargo being laden on board, the Court held there was no jurisdiction in the Court of Admiralty, and that case has been re-affirmed many times.

The Supreme Court in the case of *The Moses Taylor*, 4 Wall, p. 427, states the distinguishing feature of a suit *in rem*, as follows:

"The distinguishing and characteristic feature of such suit is that the *vessel* or thing proceeded against is itself seized and *impleaded as the defendant*, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the *vessel* or thing itself which gives to the title made under its decrees validity against all the world."

The vessel was never in the custody of the law, or within the jurisdiction of the Court.

The case of *Vandewater vs. Mills*, 19 How, 84, held expressly that there was no *Admiralty jurisdiction* of a case where the cargo was not laden on board.

In the District Court, the exception was:

"First Exception. That on the face of said libel it appears that the alleged cause, or causes of action therein set forth are not within the Admiralty and Maritime jurisdiction of this Honorable Court." (p. 84.)

The District Judge sustained the exception, and dismissed the libel. The Circuit Court affirmed the decree.

The Supreme Court affirmed this decree.

At page 92, the Court say:

"That it did not give the Court of Admiralty jurisdiction, and it is a fit subject for the jurisdiction of the common law Courts." (p. 92.)

In this case, the damage, if any, to the cargo, would not be on the ship, i. e., on the water, but would be on the land. And all damage to cargo or any other article or thing on the land, has always been held to be without the jurisdiction of the Admiralty.

Ex parte Phoenix Ins. Co., 118 U. S. 610, 618.
Cope v. Vallette Dock Co., 119 U. S., 625, 626.
Other cases.

VI.

Again there was no maritime contract in this case the time charter being a demise of the vessel and not a contract of affreightment.

The authorities cited by the defendant in error on page 11 of his brief, to the effect that "a contract upon which the Libel in the Libel proceeding was based was a maritime contract" is also without basis.

Let us examine the three authorities cited:

The case of *Morewood v. Enequist*, 23 How. 491, it was held that the Admiralty Courts of the United States had jurisdiction on contracts, charter-parties and affreightments. In that case the vessel was chartered on a mere contract of affreightment, and the vessel *received her cargo on board*; but this is not the case here.

In the case of *Mordecai v. Lindsay*, 5 Wall., 481, cited by the defendant in error, the Court held that:

Contracts of affreightments are maritime contracts over which the Courts of Admiralty have jurisdiction." But this contract is not a contract of affreightment.

In the case of the *New Jersey Steam Navigation Co., v. The Bank*, 6 How. 344, that, too, was a case of contract of affreightment on a bill of lading with a cargo laden on board, but this is not the case here.

The contract sued on in case at bar, the Time charter is not a *contract of affreightment* or charter-party of affreightment whatsoever. It does not sound in the covenants or run in contract, it is, as it has been held repeatedly, a *demise* of the vessel, and the charterer became the owner *pro hac vice* for the term; and it is not a maritime contract, after the delivery of the vessel by the owner to the lessee, it is ended until the redelivery back by the owner *pro hac vice* to the real owner.

This *demise* of the vessel is like a mortgage of a vessel, or a bill of sale of a vessel, as to which the Admiralty Court has no jurisdiction of an action for compensation or for specific performance.

The time charter sued on the libel was not a contract of *affreightment*, it was a *demise* of the vessel, the vessel having been thereby hired and "delivered" to the charterer to be "redelivered" to the owner after the term of hiring expired, and the "Master to be, so far as agency, employment or other arrangement, under the direction of the charterer."

By a long series of decisions this instrument with these clauses is a *demise* of the vessel, and not a contract of *affreightment*, a maritime contract which gives a lien or is the subject of Admiralty jurisdiction, for by it the charterer becomes the *owner* for the time being, and is his own carrier.

"In *Reed v. United States*, 11 *Wall* (*U. S.*), 591, 600, 20 L. Ed. 220, in speaking for the Supreme Court, Mr. Justice Clifford said:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in the cases where they hire the ship, and have, by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage—as, for example, to carry a cargo from one port to another—the arrangement in contemplation of law is a mere *affreightment*, sounding in *contract*, and not a *demise* of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership.

See *Del Norte* (*D. C.*), 111 Fed. 542, *affirmed* 119 *Fed.* 118, 55 C. C. A., 220.

In the case of *The Curlew*, 54 *Fed. Rep. pp.* 899 *and* 900 Southern District of New York, the Court said:

"The terms of the charter were almost identical with those in the case of The India, 14 Fed. Rep., 476, affirmed 16 Fed. Rep. 262; and they amounted, therefore, to the *demise* of the ship constituting charterers owners *pro hac vice*."

See also The Bombay, 38 Fed. Rep. 572.

In *M'Cormick v. Shippy*, 119 *Fed. Rep.* 226: The time

charter when the vessel was delivered to the charterer, the District Court of New York held:

"The contract was a *demise* of the vessel itself," and the charterer was the owner *pro hac vice* of the vessel. (229).

In the case of *The Kenilworth*, 32 *Fed. Rep.*, 486, the District Court, Judge Morris (Baltimore, 1887) held the charterers to be the owners pro hac vice, on the ground that:

"The owners had parted with their possession of the vessel, and with all control of everyone on board. It was a *demise* of the vessel for a stipulated hire, not dependent in any way upon the transportation of goods or the earning of freight." (p. 487.)

It appears, therefore, so far as the jurisdiction of the Admiralty Court is concerned, and the alleged custody of the Marshal,

(1) That by the decree of the Admiralty Court, the process was void after the hearing on that particular point.

(2) That independent of the Admiralty decree, by the evidence on the jury trial in the Court below, the process, as a matter of law, was void.

(3) Again, independently, by the Admiralty decree, the Court had no jurisdiction *in rem*, and, therefore, the arrest warrant was void.

(4) That independent of the Admiralty decree of the Court below, the libel on its face was not for the enforcement of a maritime contract, but the instrument sued on attached to the libel was a *demise* of the vessel, and not a contract of affreightment, and the Admiralty had no jurisdiction.

(5) Independently of the Admiralty decree that the damage alleged in the libel was damage to *"cargo awaiting"* arrival of the ship, that is, damage to goods on land, and not within the Admiralty jurisdiction.

For each and every of the above reasons, independently, the process was void, and Marshal was without warrant of law.

VII.

Collateral Attack of Admiralty Decree.

The authorities quoted by the defendant in error on pp. 14 and 15 of his brief, to the effect that a record in a Court is not subject to collateral attack for want of jurisdiction,

but affirms the position of the plaintiff in error, that this Decree in the record, which was introduced by the defendant in error, cannot be attached collaterally by Defendant who put it in evidence.

From the case of *Cooper*, 143 *U. S. p.* 506: Defendant quotes:

"United States District Courts sitting in admiralty are courts of superior jurisdiction and every intendment is made in favor of their decrees, so that where is appears, that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the decree is not open to attach collaterally."

Miller v. United States, 11 Wall. 268.
McCormick v. Sullivant, 10 Wheat. 192.

This citation by the defendant in error emphasizes our position, that the defendant in error himself having placed in evidence the decree of the District Court in Admiralty which dismissed the libel for want of jurisdiction, and declared the process void, cannot now be heard to attack that decree collaterally, which he, himself has put in evidence. The defendant in error, the Collector, was not a party to that suit, but for the purpose of escaping all liability here, he has put that decree in evidence. He is concluded from attacking it collaterally, as well as estopped from attacking the decree, which is his own evidence, and which, instead of proving that the Marshal, whose possession he seeks shelter under, acted under a valid process issuing in a cause in which the Court had jurisdiction, was on the contrary, acting in a cause in which the Court declared that it had no jurisdiction, and in which, under the decree of the Court, the warrant was a void process. By this evidence the Defendant proved the Marshal was equally with himself on board that ship without due warrant of law.

So far as the plaintiff in error is concerned, the principle is different, for in so much as the defendant in error put the Admiralty record in evidence, the plaintiff in error had the right to prove any material fact connected with the same, especially the fact that the original warrant was not signed by the Clerk or Deputy which made it a void warrant, in the same way in which the Admiralty Court had on hearing decreed

it in that final Decree to be a "void process." The Plaintiff in error is not attacking the decree in Admiralty but is contending for its validity and the ultimate truth that the process is *void.*

VIII.

Effect of Consent Decree in Admiralty.

The point made by the defendant in error that the decree in Admiralty in the case of *Ker & Company vs. the Laurada,* which the Defendant himself put in evidence, was a consent decree, does not affect its binding validity; nor does it affect its final and conclusive disposition of the case by the Court, especially when it is the documentary evidence—a record—of the Defendant himself.

It is to be remembered that the particular point of the validity of the process was in issue by the motion of the claimant in the cause to set aside the warrant, because of its not being signed by the Clerk (p. 65, fol. 85, Record), and that the final decree on hearing the proofs decided this question that the warrant was *void*, p .70, folio 92, Record, and that too, on hearing the proof, the proof being, presumptively, the same proof which was given by the evidence of the Deputy Clerk Seabrook at the trial of this cause below, to-wit: That the warrant was not signed by him or by the Clerk, they then both being in Atlanta and out of the jurisdiction.

In every respect, the decree was binding, because it is the act of the Court, notwithstanding it was consented to. The effect of a consent decree, in Equity and in Admiralty, is to make the same final in the disposition of the cause, and not subject to appeal, and not reviewable, even by the bill of review; and except for fraud an original Bill will not lie. The whole subject-matter is *res judicata,* and finally ended most solemnly.

The final decree by consent is a recognized, solemn and binding decree in Equity and in Admiralty.

Daniel's Chancery Pl. & Pr. Vol. 2, 1008.

"Such a decree, taken by consent cannot be set aside by a bill of review, or by a bill in the nature of review, unless

by a clerical error something has been inserted in the order as by consent, which has not been consented to."

Idem, p. 1499.

"A decree taken by consent is binding and conclusive, unless procured by fraud it is not the subject of appeal."

Idem, 974.

The case from the Supreme Court of the United States, *Haldeman v. U. S.* 91, *U. S.* 584, quoted by the defendant in error *as sustaining his position* is wholly irrelevant, for that was a case dismissed by the plaintiff, himself, which was *merely a nonsuit*, and in the facts of which case the Court held nothing adjudicated, and it was not even a bar to the second action by the Plaintiff. The record in the Admiralty Court in this case is conclusive of the points decided because the decree was, as it recites, after a "hearing on the records pleadings and proofs."

IX.

There is no waiver of jurisdictional defect in warrant, by giving Bond in the Admiralty cause.

The contention of Defendant that the giving of the bond was a waiver of a void warrant is wrong in principle and the cases he cites do not sustain his position, which is only true in case of an irregular, defective warrant that is *voidable*, but not true in case of a *void* warrant, see page 17-18 Defendants Brief.

When the court has no jurisdiction of a suit *in rem*, that is, in a case in which process *in rem* could not issue, and the same was a void process, the giving of a stipulation in such suit is no waiver.

This has been settled by a number of decisions.

In the case of *The Berkeley*, 58 Fed. Rep., 920, 923, this principle was decided by Judge Simonton.

Also in the case of *The Hungaria*, 41 Fed. Rep. 112, also decided by Judge Simonton, following the leading cases of The Fidelity, 8 Fed. Cas., page 1189; 16 Blatchf. 569, decided

by Chief Justice Waite. In that case Chief Justice Waite *held* that: "A public vessel was not subject to seizure and sale on execution" (p. 1190.).

"And is not liable to seizure in a *suit in rem*"; and "that a stipulation filed to obtain the release of the tug is not a waiver of the liability of the tug to be sued *in rem*, 1192.

In *Pacific Nat. Bank v. Mixter*, 124, *U. S.* 721, it was held that inasmuch as the attachment could not lawfully issue, the writ was *void*, and the bond given to secure its dissolution was also void; and giving the bond was no waiver, and the whole proceeding utterly null and void.

X.

Damages Proven.

The Defendants objection that no damages were proven as sustained by the steamship Laurada, made for the first time here in a typewritten brief, is wholly without merit, because Mr. Thaddeus Street, a witness for the plaintiff, at pages 18, 19 and 20, testified particularly as to the charter value of the ship per day. On page 20 he testifies:

"Q. What was her charter value per day? A. In my opinion she would be worth $150.00 per day charter value in the market.

On cross-examination he said:

"Q. You say the vessel was worth $150.00 per day? A. Yes, sir, that is the charter-rate. (p. 20.)

The damage for detention, as determined in *The Potomac* 105 *U. S.* 631, 632, is as follows:

"That the damage for the loss of the use of the vessel is the charter value, that is, the market price for such use, is the best test of the same, to be recovered as damages."

In *The Conqueror*, 166 *U. S.*, 110, 126 and 127, the Court say: "the best evidence of damage suffered by detention, is the same for which vessels of same size and class can be chartered in the market." (p. 127.)

It is, "The market price of the hire of the vessel—the charter value."

It is this "charter-value of the vessel" at the time, that is, the market price of the hire of the vessel, that was distinctly

testified to by Mr. Thaddeus Street, the ship broker—in the ship brokerage business for twenty-seven years.

The Marshal acting under a void warrant made his presence and that of his guard an unofficial and unwarranted action and did not relieve the Collector of his liability as a co-trespasser in detaining the ship as we have shewn.

Jurisdiction—This is not a suit against United States.

The defendant mistakes altogether the capacity in which he is sued.

In the caption in the complaint, he is not sued "as Collector", he is simply styled "George D Bryan, Collector of the port of Charleston". These words, "Collector of the port of Charleston," do not state the capacity in which he is sued, and are words merely descriptive of the person.

Again, he is not, in the body of the complaint, sued "as Collector," but on the contrary, he is sued as one claiming to act as Collector." Page 3, par. 3, Printed Record.

The authorities under the Code governing the subject-matter, which clearly distinguish whether a person is sued in his individual capacity, with words descriptive of the person, or, whether a person is sued in his representative official capacity, are clear upon this point:

"A complaint commencing A. B., &c., administrator of the goods of ——, deceased, plaintiff in this action, and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator or show that he prosecutes in that capacity. The introductory statement is mere *a description of the person.* In an action required to be brought by the administrator, in his capacity as such, a complaint so drawn does not contain a statement of facts constituting a cause of action, and is bad on demurrer. So of the complaint of an executor."

Merritt v. Seaman, 6 N. Y. (2 Seld.) 168.
Sheldon v. Hoy, 11 How. Pr., 11.
Christopher v. Stockholm, 5 Wend. 36.
Worden v. Worthington, 2 Barb., 368.

When a person sues or is sued in his official capacity, E. g. an administrator he is styled in caption "A. B. *as* administrat-

or", Abbotts Forms, Vol. I. 140.

"A complaint which describes plaintiff as an executor, and states the cause of action, e. g., money received—as an indebtedness due to the plaintiff *as executor*, and that the money was had and received by the defendant for the use of the plaintiff *as such executor*, sufficiently shows that the plaintiff sues in his representative character."

Scranton v. Farmers & Mechanics' Bank, 33 Barb, 527.

If it had been intended to sue him in his official capacity, and not as an individual "claiming to act as Collector," the words would have been *"as Collector"* in the caption of complaint. But being designated in the caption, "the Collector" it is descriptio personae.

The Practice under the Code of the State of South Carolina, governing this action, the caption, as well as the body of the complaint shows that he is sued in his individual capacity as for a tort not warranted by law, and that the United States is not the party-defendant sued.

The defendant not being described in the caption, save as in language descriptive of the person, and the acts alleged to be done by him, being alleged in the body of complaint as unlawful and without the authority of the law, that is, outside of the Constitutional, statutory or legal warrant, he is sued as an individual, and not as an officer, and the United States is not a real party in interest.

On the question of Jurisdiction, that this was a suit against the United States, the Court below distinctly held that "it was not a suit against the United States." (p. 82, fol., 107 Record.)

The following cases sustain this position:

Sec. 989. Rev. Stat. U. S.
Poindexter vs. Greenhow, 114 U. S., 287, 291.
Langford vs. The United States, 101 U. S. 341.
U. S. vs. Lee, 106 U. S., 196.
Hendricks vs. Gonzales, 67 Fed. Rep., 351.
Tindal vs. Wesley, 167 U. S., 204.
Pennoyer vs. McConnagy, 140 U. S. 1, 9.
Scott vs. Donald, 165 U. S. 58, 67.

Missouri vs. Missouri R. R. Comm'rs. 183 U. S., p. 53.
Reagan vs. The Farmers' Loan & Trust Co., 154 U. S. 362.
Smythe vs. Ames, 169 U. S., 466.
Ex parte Young, 209 U. S. 123, and cases cited.

It is not attempted on the part of the defendant to legally justify his acts detaining the vessel, either in the court below, or in the argument here. They were under the instructions of superior officers, but as in the case of *Hendricks vs. Gonzales*, 67 *F. R.*, 351, and in the case *of U. S. v. Lee*, 106 *U. S.*, 196, they were without the authority of the law, and invaded the constitutional guaranty of the citizen, that his property as well as his person should be secure from invasion.

CONCLUSION.

The merit and justice of the plaintiff's claim in this case is apparent.

The trial court below was controlled by what it regarded a nice legal point .

The court stated, in directing the verdict for the defendant:

"There is certainly an appearance of blame, a good claim on the part of the plaintiff, which could be presented to the Congress of the United States or to the Court of Claims possibly, which may consider the equities of the case, but as a mere question of law, it seems to me that the plaintiff has no case." (p. 82, fol. 107, Record.)

On the question that the custody of the Marshal was void, the court took this view of the case:

"That if this were a suit against the Marshal, probably the court would hold that the marshal could not be protected under a void proceeding, but that is not this case." (p. 83, fol. 109 Record.)

The Court further held:

"The simple question here is whether or not the Marshal had possession; if the Marshal had possession then the Collector did not." (p. 84, fol. 109, Record.)

This is vital error in the Court's reasoning; if the process

was void, as we have shown, the Marshal was without due process of law, and although he may have been in possession, it was an unlawful possession, and not the custody of the law. And the Collector was also unlawfully in possession together with the Marshal in an unlawful possession, and not in the custody of the law, for 20 days.

Under the authority cited in our main Brief, *Sessons v. Johnson*, 95, *U. S.* 347, 348, which states the controlling principle, neither the Marshal or the Collector could plead the wrongful possession of the other as a defense. The possession of neither was official, under due process of law, nor was it exclusive, one of the other.

Both the Marshal and the Collector by their representatives exerted a physical possession; and the Inspector, representing the Collector, by the testimony, took physical possession without objection of the Marshal.

The Marshal's Guard being examined, testified:

"He did not take the vessel away from the Inspector; that he never turned him off from the vessel or tried to do so." (p. 30, fol. 39, Record.)

This wrongful, physical custody of Defendant continued for twenty days, and being not excused by other wrongful physical custody by the Marshal or any other party whomsoever; and the vessel, in the language of the defendant, being actually detained by him, in his letter to Senator M. C. Butler, Counsel for the Laurada, our claim is founded not only in full justice and equity, as the Court below recognizes, but technically in legal right, under the authorities we have cited.

We, therefore, pray a reversal of the judgment and a new trial.

Respectfully submitted,

M. C. BUTLER,

J. P. K. BRYAN,

Counsel for Plaintiff in Error.

BRIEF OF PLAINTIFF IN ERROR.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 808.

ROXANA S. KER, Executrix of W. W. Ker, Deceased, Plaintiff in Error,

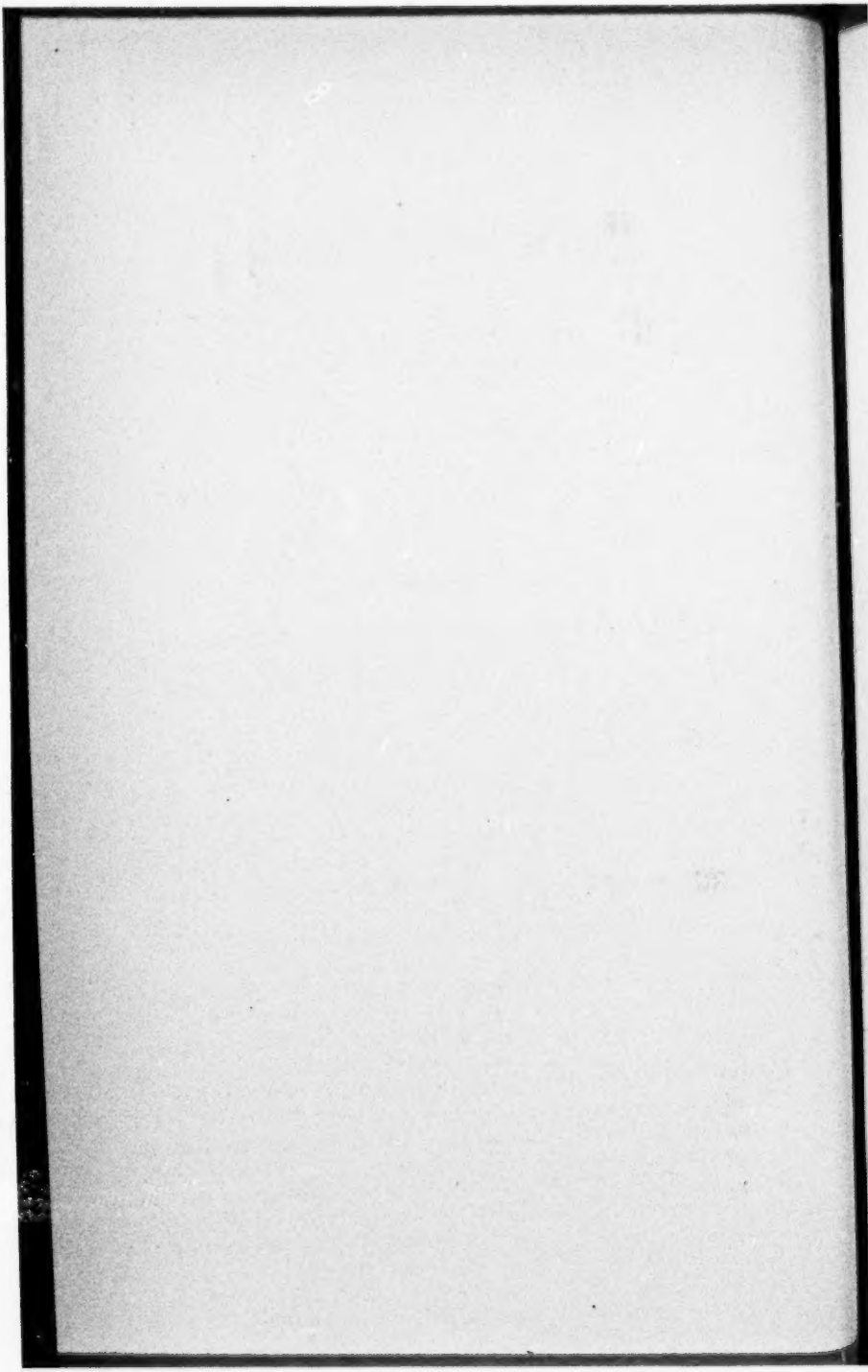
versus

GEORGE D. BRYAN, Collector of Port of Charleston, Defendant in Error.

ARGUMENT of J. P. K. BRYAN, Counsel for Plaintiff in Error.

INDEX.

Statement of the Case	3
Pleadings	3
Answer	4
Exceptions	5
Evidence	7



STATEMENT OF THE CASE.

This is an action at law for damages for the unlawful detention of the steamship "Laurada," brought in October, 1896, by W. W. Ker, a citizen of Pennsylvania, owner of the steamship "Laurada," plaintiff, against George D. Bryan, a citizen of South Carolina, Collector of the Port of Charleston.

On the death of the plaintiff, his widow, Roxana S. Ker, executrix, in January, 1902, was substituted as plaintiff by the Circuit Court (pp. 6 and 8, Record).

The Court below directed a verdict for defendant on the whole evidence. The plaintiff brings this case here on writ of error, assigning error in such direction of verdict by the Court.

PLEADINGS

The complaint alleged the citizenship of the parties, the ownership by the plaintiff of the steamship "Laurada," a merchant vessel of the United States, registered at the Port of Philadelphia (p. 2, Record).

"That on the sixteenth day of November, 1895, the said steamship 'Laurada,' being in the port and harbor of Charleston, proceeding with her officers and crew on board, in the due fulfilment of her freight engagements as a merchant vessel of the United States, the said George D. Bryan, claiming to act as Collector of the Port of Charleston, and in the name of the United States, unlawfully seized, and caused to be seized, the said steamship 'Laurada,' and under an alleged authority and direction of the Government of the United States, unlawfully and wrongfully detained the said steamship 'Laurada' at the Customhouse Wharf, in the port and harbor of Charleston, in the District of South Carolina, and refused to allow said steamship to proceed in the due fulfilment of her freight engagements, for the space of twenty-one days, to wit, from the 16th day of November, 1895, to and inclusive of the 6th day of December, 1895" (pp. 2, 3, Record).

"Fourth. That all such acts and doings of the said George D. Bryan, claiming to act as Collector of the Port of Charleston, and under an alleged authority and direction of and in the name of the Government of the United States, were without warrant of law, and all such alleged authority and direction of the United States Government were null and void (p. 3, Record).

"Fifth. That by such wrongful and unlawful acts of the said George D. Bryan, claiming to act as Collector of the Port

of Charleston, this plaintiff has been injured in the loss of the use and earnings of said steamship to his damage five thousand dollars" (p. 3, Record).

ANSWER.

1. The answer of d[illegible]ndant admits the allegations of citizenship, and that the defendant was at the time Collector of the Port of Charleston.

2. It puts the plaintiff upon proof of the ownership of the steamship "Laurada."

3. He denies the other allegations of the complaint, except as hereinafter stated, and specifically pleads as follows:

"That he denies each and every other allegation in said complaint contained, except as hereinafter stated; that true it is that acting under instructions received from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the 'Laurada' and formally *take possession* or charge of said vessel, and that he kept her in *his custody* and under his control for *twenty-one days*, but this defendant was then informed and verily believes that the said 'Laurada' was then about to depart from the United States, with arms, munitions of war and men, constituting a military expedition, and was intended by her owners to commit hostilities upon the subjects and property of the Island of Cuba, a colony of the kingdom of Spain, with which the United States was at peace, and that there was probable cause for *such detention* of the said vessel" (p. 5, Record).

For a second defense, the defendant more particularly pleads:

"Third. That true it is, the defendant, acting under instructions from the Secretary of the United States, caused the steam vessel 'Laurada' to be formally detained by placing an inspector on board. But this defendant alleges, that no injury or damage resulted to the plaintiff thereby, the said 'Laurada' then being in custody of the Marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Ker & Co., against the steamship 'Laurada,' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895, and this defendant submit that any damages sustained was by reason of such detention, and did not result from the act of this defendant" (pp 5, 6, Record).

From the pleadings, therefore, it is clear, on the admissions thereof, that the defendant—

"Acting under instructions received from the Secretary of the Treasury of the United States of Amreica, caused one of

the inspectors to go on board the 'Laurada,' and formally *take possession* or charge of said vessel, and that *he kept her in his custody* and under his control for twenty-one days."

Second. That as a justification for such action, the defendant pleads:

"That this defendant was then informed and verily believes that the said 'Laurada' was then about to depart from the United States with arms, munitions of war and men, constituting a military expedition and was intended by her owners to commit hostilities upon the subjects and property of the Island of Cuba, a colony of the kingdom of Spain, with which the United States was at peace, and that there was probable cause for such detention of the said vessel

The third defense of the defendant is, after admitting that he did "take possession of and keep the 'Laurada' in his custody and under his control for twenty-one days," is that "No injury or damage resulted to the plaintiff thereby, the said 'Laurada,' then being in the custody of the Marshal under a libel issued out of the District Court for the District of South Carolina at the suit of John E. Kerr & Co., and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant."

On the whole evidence the defendant's attorney moved the direction of a verdict on the grounds set forth on page 81, more particularly, that the "Laurada" was then held by the United States Marshal under a process from the District Court in Admiralty and was *in the custody of the law*, and for that reason, being in the custody of the law, the steamship could not be in the custody of any other person.

The Court directed a verdict for the defendant, stating its position on pages 82 and 83.

EXCEPTIONS.

The exceptions of the defendant are on pages 84, 85 and 86 of the Record, which are the same as the Assignments of Error, one pages 87 and 88 of the Record, and are as follows:

First Assignment.

The Court erred in instructing the jury to bring in a verdict for the defendant on the whole evidence.

Second Assignment.

The Court erred in holding and charging as follows: "As a mere question of law, it seems to me, that the plaintiff has no case, that the ship was not in the possession of the defendant, collector of the port, but was in the possession of the Marshal,

and it appeared to be a lawful process, and if she was in the possession of the Marshal, then she could not have been in the possession of the defendant, collector, and the defendant, collector, therefore, is not responsible."

THIRD ASSIGNMENT.

The Court erred in not holding that the defendant, collector, was detaining the ship in point of fact.

FOURTH ASSIGNMENT.

The Court erred in holding and charging, "Now, it is argued, with great acuteness and with great ability, that the proceeding was unlawful from the beginning, that is, that the deputy clerk had no right to authorize his brother to sign and to put the seal of the Court upon the monition; and also argued that there was no jurisdiction, that Ker & Company had no just claim against the ship which could be enforced in Admiralty, and that all proceeding is void. If this were a suit against the Marshal, all of that learning would be valuable, and probably the Court would hold that the Marshal could not be protected under a void proceeding, but that is not this case."

FIFTH ASSIGNMENT.

The Court erred in holding and charging, "The simple question here is whether or not the Marshal had possession; if the Marshal had possession, then the collector did not. Undoubtedly upon the proof the Marshal did have possession of the ship and the Government gets out in that way."

SIXTH ASSIGNMENT.

The Court erred in not holding that the Marshal of the United States for District of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest, in the case of Kerr & Company v. S. S. "Laurada," on the ground that the District Court of the United States for the District of South Carolina, sitting as a Court of Admiralty, had no jurisdiction in rem of the subject matter of said suit, and that said warrant was, therefore, illegal, null and void, and was no warrant and due process of law to said Marshal.

SEVENTH ASSIGNMENT.

The Court erred in not holding that the Marshal of the United States for District of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest in the case of Kerr & Company v. S. S. "Laurada," on the ground that it appears by the evidence the said warrant of arrest was not issued out of said Court and signed,

and the seal of the said Court affixed by the Clerk of the said District Court of the United States for District of South Carolina or his deputy, but that same was issued, signed, and the seal of said Court attached by a private, unofficial person, in the absence from the District of South Carolina of both the Clerk and the DeputyClerk of the District of SouthCarolina, and said warrant of arrest was, therefore, illegal, null and void, and was no warrant and due process of law to said Marshal.

EIGHTH ASSIGNMENT.

That the Court erred in not holding, on the fact of this case, that in detaining the S. S. "Laurada," both the Marshal of the District of South Carolina, under the said warrant, in the case of Kerr & Company v. the "Laurada," and the said defendant, collector, were both trespassers, and as such joint trespassers and joint tort feasors were unlawfully holding and detaining said S. S. "Laurada," and that they were both and each of them, jointly and severally liable for the damages for detention.

NINTH ASSIGNMENT.

That the Court erred in holding the defendant was saved from liability in this suit for his admitted detention of the S. S. "Laurada," because of the detention at the same time, by the United States Marshal, acting under a void warrant of arrest of said S. S. "Laurada," in the case of Kerr & Company v. the S. S. "Laurada."

The Court having directed a verdict for defendant necessitates our stating the evidence on all the issues.

EVIDENCE.

OWNERSHIP OF "LAURADA."

In proof of the allegation of the second paragraph of the complaint, the ownership of the "Laurada" by the plaintiff, Wm. W. Ker, the defendant introduced in evidence:

1. The bill of sale of John D. Hart, owner of the steamship "Laurada," to William W. Ker, of Philadelphia, dated 24th January, 1895 (pp. 70, 71, 72, Record). The same being a certified copy under the seal of the Collector of the Port of Philadelphia (p. 75).

This certified copy of the record of the original bill of sale is introduced in evidence after the proof by Roxana S. Ker, the executrix of William W. Ker, the plaintiff, who testified that after diligent search for the original bill of sale of the steamship "Laurada," by John D. Hart to Wm. W. Ker, dated

January 24, 1895, that she had not seen it, and never had it in her possession at any time (p. 52).

2. The plaintiff also introduced in evidence a certified copy of the Register of the steamship "Laurada," dated 27th January, 1895, under the seal of the Collector of the Port of Philadelphia (pp. 73, 74 and 75), in which it appeared that: "W. W. Ker, of Philadelphia, Pa., having taken and subscribed the oath required by law, and having sworn that he is the only owner of the vessel called the 'Laurada,' of Philadelphia," etc. (p. 73) * * * "Said vessel has been duly registered at the port of Philadelphia" (p. 74).

3. The plaintiff also proved the death of William W. Ker, the owner of the "Laurada," on January 31, 1901 (p. 52, Record), and leaving a last will and testament (pp. 75, 76, 77 and 78, Record), upon which letters testamentary were issued unto Roxana S. Ker on the 17th January, 1902 (p. 78), who was substituted by the Court as executrix, plaintiff, in lieu of the original plaintiff, William W. Ker, deceased, by order of the Court, 30th January, 1902 (p. 8, Record).

It appears, therefore, that the ownership of the "Laurada" was fully proven by the record evidence, as alleged in the complaint.

"LAURADA," A MERCHANT VESSEL—NOT BUILT FOR WARLIKE PURPOSES.

That she was a merchant vessel of the United States, was also proven by the Register aforesaid, and more particularly proven by the testimony introduced by the plaintiff, as follows, to wit:

By the testimony of C. W. TOWNSEND, a witness for the plaintiff, who testified as follows (p. 18, Record):

Q. Was she a merchant ship? A. Yes, sir.

Q. What kind of trading had she done here? A. Carrying pyrites cinders (p. 17).

Q. Was the "Laurada" a merchant vessel? A. Yes, sir.

Q. Was she a war vessel in any sense at all? A. I did not see anything to indicate a war vessel.

Q. Was she a war vessel or a merchant vessel? A. A merchant vessel.

Q. Was she built like a war vessel is built? A. No, sir.

Q. Was she an ordinary merchant vessel or was she manifestly built for warlike purposes? A. Merchant vessel (p. 18).

Also by the testimony of MR. THADDEUS STREET, who has been engaged in the shipping business for twenty-seven years, who testified as follows:

Q. What kind of a ship is she? Merchant ship? A. I would consider her an ordinary merchant vessel (p. 21, folio 30).

Also by the testimony of MARTIN JOHANSEN, Second Officer of the vessel:

Q. Was she a merchant vessel or a war ship? A. She was a merchant vessel (p. 43—folio 55).

And by PHINEAS E. THURSTON, Chief Engineer:

Q. Was she not a merchant vessel? A. She was a merchant vessel (p. 48—folio 62).

There is no testimony whatever that she was not a merchant vessel, or that she was manifestly built for warlike purposes.

There is no testimony that at the time she was seized and detained, as admitted by the defendant, there was on board any arms or munitions of war or men constituting a military expedition; or that there was any such arms, munitions of war and men, constituting a military expedition anywhere with which she was about to depart the United States (as alleged in paragraph three of the answer, p. 5, Record).

On the contrary, the defendant himself, offering no evidence in support of the allegations of paragraph 3 of the answer, testifies (p. 34, Record):

"I think it very well for it to come out, in consultation with "Mr. Murphy, as I was instructed to do by the Government, "we came to the conclusion that there was NO EVIDENCE that we "could get to convict the vessel, and I wrote to the Department, "told them exactly the state of affairs, and they instructed me to "take my inspector off."

It is, therefore, established by defendant's testimony that the allegation in the third paragraph of the answer that at the time when the defendant did *"take possession* or charge of said ves- "sel and kept her in his custody and under his control for "twenty-one days, he was informed and believes that the said " 'Laurada' was then about to depart from the United States "with arms, munitions of war and men constituting a military "expedition, etc., and that there was probable cause for such *"detention* of said vessel," is, not only NOT sustained, but by the defendant's own testimony, "there was NO EVIDENCE to "convict the vessel."

On the contrary, it is also affirmatively established by the whole evidence that when she was seized in Charleston and detained by the Collector, for twenty-one days, this merchant vessel had come to Charleston for a cargo of pyrites, which was then ready for her, and that she was prevented from load-

ing the same. Her holds were empty, and having on board no arms or munitions of war and here crew being the ordinary chew of a merchant vessel.

This appears from the evidence of all the witnesses.

More particularly the evidence of *C. W. Townsend*, the Stevedore, who was about to load the vessel, who testified that she had been several times in the port of Charleston carrying pyrites cinders from Charleston. Used for chemical purposes. He had loaded her about seven or eight times. Employed as stevedore to load her with a cargo of pyrites cinders. She went to the Savannah Railroad Wharf. Was ready to load her in the usual course of her previous loading. Was not allowed to load her. Prevented by the U. S. Customhouse officer. She was taken from the Savannah Railroad Wharf to the Customhouse Wharf (p. 17).

Mr. *Thaddeus Street*, the Charleston Ship Broker, who handled the vessel, testified that he represented the parties in New York for the purpose of carrying a cargo. She was under charter for shipment of pyrites cinders from Charleston to some northern port.

Q. Was she, to your knowledge, as representing the shippers, was the engagement for her to take pyrites cinders? A. Yes, sir. We were proceeding to load the ship, we were prepared to do it (p. 19, Record).

He further says that the cargo stood on the wharf undelivered. I know the fact that the ship was moved from the Savannah Wharf and refused to take my cargo and the cargo was not taken by the steamship "Laurada" and went forward by the schooner, David Baird (p. 22, Record).

It also appears by the testimony of *Martin Johansen*, Second Officer of the "Laurada," when she came to Charleston from New York, she had no guns or cannon on board (p. 43). No soldiers were aboard of her while in Charleston. She had no munitions of war while she was on her way to Charleston. She came for a cargo of pyrites; her holds were empty, when she was seized (p. 43). That she went to Charleston from New York frequently. That her crew were ordinary sailors, and the Captain had been her master for several months. About twenty-one men, two officers and the captain (p. 44).

Q. Did you ever, while lying in the harber, go down in the hold of the vessel and make a thorough examination of it? A. Yes, often.

Q. A careful examination? A. Working around cleaning and scraping, cleaning her hold.

Q. Were you on board of her continually during her stay in Charleston? A. Yes, sir.

Q. Was there any cargo taken on at Charleston? A. No, sir (p. 46).

Also the same testimony by *Phineas E. Thurston*, Engineer of "Laurada," who testified she was a merchant vessel, had no guns or cannon aboard or munitions of war or soldiers at any time in Charleston. She came for a cargo of pyrites; her holds were empty (p. 47). Her crew were ordinary sailors (p. 48).

It is my duty to inspect the hold of the vessel once every day to see whether there is any leakage (p. 49). Total number of crew twenty-one or twenty-three.

Q. Is it not true that this boat was seized at Wilmington, Del., a short time before her trip to Charleston on account of the charge of filibustering? A. No.

Q. Was she not seized for filibustering while you were connected with her before this trip to Charleston? A. No.

Q. Never? A. No.

THE DEFENDANT DID ACTUALLY DETAIN THE "LAURADA."

That the defendant did actually detain the seamship "Laurada" for the space of twenty-one days, conclusively appears in the record, as follows:

1. By his admission in the answer, as follows:

"That true it is that acting under the instructions from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the "Laurada" and formally *take possession* or charge of said vessel, and that *he kept her in his custody for twenty-one days*" (par. 3, the Answer, p. 5, folio 6, Record).

2. It further appears that her detention was in pursuance of the instructions of the Secretary of the Treasury, as contained in the telegrams of the Secretary of the Treasury to the defendant collector on p. 32 of the Record:

"78 A. F. C. F. 76 Paid Gov't. 4:35 P. M.
"Washington, D. C., Nov. 15.

"Collector Customs, Charleston, S. C.:

"Secretary State requests this Department to take such in-
"stant and appropriate action as is necessary to vindicate the
"neutrality laws in the case of the steamer 'Laurada' *supposed*
"to have landed a hostile expedition from the United States
"in Cuba; if the vessel arrives in your District, you will please
"take measures for her *detention* and report acts to this De-
"partment without delay, consult United States Attorney.
"C. S. HAMLIN, Actg. Secy."

"51 A. C. M. A. D. 50 Paid Gov't. 2:49 P., Nov. 16.
"Washington, D. C., 16.

"Collector Customs, Charleston, S. C.:

"Referring to telegram yesterday relative to steamer 'Lau-

"rada,' Collector Customs, Philadelphia, states that he advised "by Marine Exchange that she had just arrived at your port. "Take measures as directed in yesterday's telegram for *deten-"tion* vessel and report by telegraph.

"C. S. HAMLIN, Acting Secretary."

P. 32, Record.

These instructions to the Collector were that he should *detain* the vessel. That he followed these instructions out appears in his own testimony:

"Q. You might tell what you did? A. This telegram instructed me to take measures for the *detention* of the 'Laurada' and to consult with the United States Attorney, who at that time was Mr. Perry Murphy. Immediately upon receipt of this telegram on the 15th November, I consulted Mr. Perry Murphy, who at that time had his office in the United States Customhouse, Court was located there, it was convenient, and I took the telegram and went to him and consulted with him, and he advised me to put an *inspector aboard the 'Laurada,'* which I did."

(Folio 42, p. 33, Record.)

3. It also appears by the letters at the time of the defendant Collector to the then Senator M. C. Butler, one of the counsel of the steamship "Laurada," which are set forth at pages 16, 80 and 81 of the Record:

"Charleston Hotel, Charleston, S. C., Nov. 20, 1895.

"Hon. Geo. D. Bryan, Collector of Customs, Charleston, S. C.

"My Dear Sir: We are informed that you are *detaining* the steamer 'Laurada' on behalf of the United States.

"We are desirous that she shall *forthwith proceed* and therefore beg to inquire if she may do so now, as we do not wish to advise conflict with the instructions of the Government of the United States. We request an early reply,

"Very truly yours,

"M. C. BUTLER,

"Counsel for S. S. 'Laurada.'

"Please address me 11 Broad St., Charleston, S. C., P. O. Box 244."

"Office of the Collector of Customs,

"Port of Charleston, S. C.,

"November 20, 1895.

"Hon. M. C. Butler, Counsel for S. S. 'Laurada.'

"My Dear Sir: Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I *am detaining* the steamer 'Laurada' on behalf of the United States.

"I could not permit her to proceed as indicated in your letter as my instructions are to *detain* her.

"Yours very truly,

"G. D. BRYAN, Collector."

(P. 80, Record.)

"Office of the Collector of Customs,
"Port of Charleston, S. C.,
"December 6, 1895.

"Hon. M. C. Butler, Counsel for S. S. 'Laurada,' Charleston, S. C.

"Sir: I beg to inform you that under instructions from the Government, I have today withdraw my inspector from the 'Laurada,' and she is free, so far as this office is concerned.

"Yours respectfully,

"G. D. BRYAN, Collector."

(P. 81, Record.)

From this correspondence at the time, it appears again, conclusively, that the defendant, the Collector, was actually detaining the steamer "Laurada," for upon inquiry by Gen. M. C. Butler, counsel or the steamship "Laurada," on the 20th of November, saying:

"We are informed that you *are detaining* the steamer 'Laurada' on behalf of the United States;" and stating: "We are desirous that she shall *forthwith proceed*, and therefore beg to inquire if she may do so now."

The reply of the defendant Collector on the same day, 20th November, 1895, was:

"In reply, I beg to say that you are correctly informed that *I am 'detaining the steamer 'Laurada'* " on behalf of the United States."

"I could not permit her to proceed, as my instructions are to detain her" (p. 80, Record).

And this actual custody and detention by the Collector, under his instructions, until the 6th day of December, 1895, when, in his letter to General Butler, counsel for the "Laurada," the defendant informs him that: "Under instructions from the Government I have today withdrawn my inspector from the 'Laurada,' and she is free" (p. 81, Record).

It further appears by the plaintiff witness, Townsend, stevedore of the steamer at Charleston, that the steamer "Laurada" was moved in Charleston from the Savannah Railroad Wharf where she was ready to take her cargo there ready for her, to the *Customhouse Wharf* (p. 17, folio 125, Record). This was a further act of control and detention by the Collector.

It, therefore, conclusively appears, both by the admission in the pleading, and by the testimony of the defendant himself,

and by his letters written at the time, in the replies to the letters of the steamer's counsel, Senator M. C. Butler, that the steamer was actually being detained by the Collector, with an Inspector of the Customhouse aboard, who had "taken possession of the steamer," "was in custody of the steamer and would not permit her to proceed."

"LAURADA" ILLEGALLY DETAINED BY COLLECTOR.

Sec. 5290 of Revised Statutes of United States is plead for justification. But when analyzed in its literal words, it is:

(1) "The several Collectors of the Customs shall detain any vessel manifestly built for warlike purposes

(2) "and about to depart the United States;

(3) "the cargo of which principally consists of arms and munitions of war.

"WHEN.

(a) "the number of men shipped on board,

(b) "or other circumstances render it probable—that such "vessel is intended to be employed by the owners to cruise or "commit hostilities upon the subjects, citizens or property of "any foreign principality or State, colony, district or people "with whom the United States are at peace, until the decision "of the President is had thereon, or until the owner give such "bond and security as is required of the owners of armed ves- "sels by the preceding Section."

Under the authority of this Statute for detention of a vessel by the Collector, before he can act under this statutory warrant, there must exist the facts (1) that "the vessel was manifestly built for warlike purposes;" and (2) that she is "about to depart the United States;" and (3) that the cargo of which "principally consists of arms and munitions of war"—unless these facts appear, he has no statutory warrant whatever to detain the vessel. When they do appear as a basis, and other facts, i. e., of "the number of men shipped on board," or other circumstances render it probable that she is intended for a military expedition, then, and not until then, can she be detained. In this case the defendant has not said, nor has any one said that the "Laurada" "is manifestly built for warlike purposes," that she "is about to depart the United States," and "that the cargo consisted of arms and munitions of war," and the whole basis for such action is wanting. Not only this, but there were no men shipped on board of her except her sailors.

The total lack of proof, and absence of fact which, under the warrant of law, the Collector alone could proceed, demonstrates the lack of probable cause for the action of the Collector in detaining the vessel. It is not a question of conflict of evidence, there is absolutely no facts whatsoever which, under the

statute this action of detention can be justified. It was done only on the instruction of the Treasury Department to the defendant, and the defendant must obey, even if there is no evidence or warrant of law.

The reason the defendant Collector must obey the unlawful mandate of his superior is because the United States protects him in so doing.

Sec. 989 Revised Statutes U. S. provides that: "When a recovery is had in any suit or proceeding against a Collector or other officer of the revenue for *any act done by him,* or for the recovery of any money exacted by or paid to him, and by him paid into the Treasury, in the performance of his official duty, and the Court certifies that there was probable cause for the act done by the Collector or other officer, or *that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government,* no execution shall issue against such Collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Rev. Stat. U. S., p. 185.

It will be noted that even if there was "probable cause" for the act done by the Collector, that is no justification of the Collector, as alleged in paragraph two of the answer, but the "probable cause" does not confer any legal authority, and would not bar the plaintiff's right of action, but it would only have the effect, under this statute, of having the Court to certify "that there was probable cause for his act, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government," and thereby he would be relieved of a personal judgment, and the amount would be paid out of the proper appropriation from the Treasury."

The Statute and the cases upon this subject show the policy of the Government is not to make the private citizen bear the damage that an unlawful act of this nature causes; but even if there was "probable cause," or a direction of the Secretary of the Treasury, or officer of the Government, which did not constitute due process of law, or was not a legal justification, the Government would pay out of its own Treasury the damage to the private citizen.

Hendricks v. *Gonzales,* 67 F. R., 351.
Conqueror, 166 U. S., 123, 124, 125.
See, also, *Cruickshank* v. *Bidwell,* 176 U. S., 81, 82.
And *DeLima* v. *Bidwell,* 182 U. S., 179.
U. S. v. *Sherman,* 98 U. S., 566, 567.

We ask particular reference to the case of *Hendricks* v. *Gonzales,* 67 Fed. Rep., 351, which was an action against a

collector of the port of New York, to recover damages or the detention of a vessel, in which the Court held:

"It is no justification to a collector of customs for detaining a vessel that he acted under instructions from the Secretary of the Treasury, unless such instructions were authorized by law."

And further holding that: "It is not enough to justify a collector of customs in detaining a vessel under Revised Statutes 5290, that it is the purpose of her intended voyage to transport arms and munitions of war for the use of an insurrectionary party in a country with which the United States are at peace."

In that case the U. S. Circuit Court of Appeals affirmed the judgment for the plaintiff in a case very much stronger for defendant Collector than this case, where the Collector had detained a steamer, acting under the instructions of the Secretary of the Treasury. The facts in that case that were brought to the information of the Collector in respect to the vessel, and the purposes of her voyage were:

"That she was an ordinary merchant steamer; that her cargo consisted wholly of arms and munitions of war; that the charterer was in sympathy with the Venezuelan insurgents; that she was bound for a port near the seat of hostilities; but that she was not at that time manned, or in a state of preparation otherwise for belligerent operations. Information had also been communicated to him tending to show that the war materials on board the vessel were destined for the ultimate use of the insurgent forces" (p. 352).

The case was submitted to a jury, who found for the plaintiff. Error was assigned "because of the refusal of the trial Judge to rule that the defendant was exonerated from liability for his acts by his instructions from the Secretary of the Treasury, and also for the refusal to instruct the jury that, if the defendant had reasonable cause to believe that the vessel was chartered and loaded for the purpose of transporting arms and munitions of war to the insurgents of Venezuela, he was justified in refusing a clearance" (p. 353).

The Appeal Court says, p. 353:

"Neither the Secretary of the Treasury nor the President could nullify the Statute, and, though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized by law. *Little* v. *Bareme*, 2 Cranch, 170; *Otis* v. *Bacon*, 7 Cranch, 589. It is provided by Statute (Rev. St. U. S., Sec. 989), that when a recovery is had in any suit against a collector or other officer of the revenue for any act done by him in the performance of his official duty, and the Court certifies that he acted under the directions of the Sec-

retary of the Treasury, no execution shall issue, but the amount recovered shall be paid from the Treasury. It was to provide for a case like the present that this statute was enacted, and the statute would have been wholly unnecessary except that the order of a superior officer is no defense to an inferior for the unlawful performance of an official act."

"The neutrality laws of the United States (Rev. St., Sec. 5290), authorize collectors of customs to detain, until the decision of the President is had thereon, 'any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances render it probable that such vessel is intended to be employed by the owners to cruise or to commit hostilities upon the subjects, citizens or property of any foreign prince or State, or of any colony, district or people with whom the United States are at peace.' The *defendant's justification must be found under the authority of this Statute, or it can not be found at all.* That it is not found there is almost too plain for argument. The vessel was not 'manifestly built for warlike purposes,' but was an ordinary merchant steamship. If she had been built for warlike purposes, that fact alone would not have authorized her detention by the Collector, because the Statute does not permit even such a vessel to be detained unless the number of men shipped on board or other circumstances render it probable that she is intended to be employed 'to cruise or commit hostilities,' or, in other words, engage in naval warfare against the subjects or property of a friendly power. It is not an infraction of international obligation to permit an armed vessel to sail or munitions of war to be sent from a neutral country to a belligerent port, for sale as articles of commerce; and neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerents, articles which are contraband of war. It is the right of the other belligerent power to seize and capture such property in transit; but the right of the neutral State to sell and transport, and of the hostile power to seize, are conflicting rights, and neither can impute misconduct to the other. The penalty which affects contraband merchandise is not extended to the *vessel* which carries it, unless ship and cargo belong to the same owner, or the owner of the ship is privy to the contraband carriage; and ordinarily the punishment of the ship is satisfied by visiting upon her the loss of time, freight and expenses which she incurs in consequence of her complicity. On the other hand, it is the duty of every government to prevent the fitting out, arming or equipping of vessels which it has reasonable ground to believe are intended to engage in naval warfare with a power with which

it is at peace. These are familiar rules of international obligation, in the light of which the particular Statute is to be read. It is intended to prevent the departure from our ports of any vessel intended to carry on war, when the vessel has been specially adapted, wholly or in part, with this jurisdiction, to warlike use. There was not a particle of evidence brought to the attention of the collector tending to show that the vessel was intended to be employed in acts of war. It is not enough that it was the purpose of her intended voyage to transport arms and munitions of war for the use of the insurrectionary party in Venezuela. The Florida, 4 Ben., 452; Fed. Cas., No. 4887; The Carondelet, 37 Fed., 799; The Conserva, 38 Fed., 431; *U. S.* v. *Trumbull*, 48 Feb., 99.

"There was no error prejudicial to the defendant in the rulings of the trial Judge. Indeed, if, instead of submitting the question of probable cause to the jury, he had ruled, as matter of law, that the evidence did not make out a case of probable cause, we think he would have been justified in doing so. The judgment is affirmed."

Hendricks v. *Gonzales*, 67 Fed. Rep., 352, 353, 354.

On the facts of this case at bar admitted by the defendant Collector himself, that there was *"no evidence"* to convict the vessel, and the affirmative testimony of plaintiff's witnesses showing the unlawful detention while the "Laurada," lawfully, as a merchant ship, was proceeding to take a cargo of pyrites cinders as previously, to a northern port, holds empty and no cargo on board, made a clear case of liability on part of defendant.

DEFENDANT'S SECOND DEFENSE NOT SUSTAINED.

That the Marshal of the United States, by his Deputy, was also aboard of the steamer does not relieve defendant of liability, as the Marshal was acting under a void warrant issued in the cause, and the Court had no jurisdiction, and was himself without any authority of law, and a trespasser equally with the defendant.

The further defense of the defendant Collector in this case is that notwithstanding he actually did take possession of and had custody for twenty-one days of the steamer "Laurada," and did detain her under the instructions of the Treasury Department, that this caused no damage to the plaintiff, because, "the said 'Laurada,' then being in custody of the Marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Ker & Co. against the steamship 'Laurada,' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by

him until the 18th day of December, A. D. 1895, and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant."

(Pp. 5 and 6, Record).

In other words, the plea of the defendant is, that although he may have unlawfully detained the steamer "Laurada" for twenty-one days, some other person, to wit, the Marshal of the United States, was also detaining her during that time, and that under legal process, whereby the vessel was *in the custody of law.*

This contention, however, can not be sustained by the facts in evidence under a proper legal understanding of the same, for although a person claiming to be a guard of the U. S. Marshal was on board at the same time that the Inspector of the defendant was on board, still upon examination of the record, in *John E. Ker & Co.* v. *"Laurada,"* it appears that the Marshal and his Deputies and Guards were upon the vessel without authority of law under a *void* process issuing out of the said Court, and that the Court had no jurisdiction of the subject matter of the case, and the Marshal and all persons acting under him were trespassers equally with the defendant.

To sustain this second defense of the defendant, the defendant introduced in evidence the record of *John E. Ker & Co.* against *The Steamship 'Laurada,"* an action *in rem,* in Admiralty in District Court U. S. for South Carolina, which record is set forth on page 52 to page 70 of the printed Record.

The declared purpose of defendant in introducing the said record is: "For the purpose of showing the custody of the Marshal" under the warrant of arrest in that suit (folio 35, p. 26, Record).

This record of the proceeding *in rem,* however, instead of justifying the Marshal in his custody, and instead of showing that the vessel was *in custodia legis,* shows that the Court had no jurisdiction *in rem* in this case, and the process was void.

This appears by the final decree of the Admiralty Court in that case:

"John E. Ker & Company,
vs. "*Libel in Rem.*
S. S. "Laurada."

"This cause came on to be heard before the District Court of the United States for the District of South Carolina on the records, pleadings and proofs herein.

"Whereupon it is now ordered, adjudged and decreed that

the libel herein be dismissed for want *of jurisdiction of the Court in rem in this cause and process herein being void.*"

"WM. H. BRAWLEY, U. S. Judge."

"5 December, 1899." (P. 20, Record.)

So that the Admiralty record, which is introduced in evidence by the defendant, by the final decree in the cause determined, first, that the Court has no jurisdiction of the cause *in rem.*

And secondly, That the process in the cause was void.

So that it appears that the record introduced by the defendant with the purpose of proving that, during the time that the defendant was in custody and detaining the "Laurada" she was in *custodia legis* in possession of the Marshal, proves conclusively that the Court was without jurisdiction of the action *in rem,* and that the process to the Marshal was *void.*

Under the authorities on this state of facts, and final decree, the "Laurada" would not be while in the possession of the Marshal *in custodia legis,* but on the contrary, the Marshal and those acting under him, would be traspassers, and would be private, unofficial persons, and tort feasors with the defendant in detaining the vessel.

Not only did the Court so finally decree in the cause of John E. Ker & Company against the S. S. "Laurada," which is conclusive upon the defendant here and upon this Court here, as being the final decree in that cause, the record of which was put in evidence by the defendant himself as a defense, but if we examine the record, put in evidence, this Court would independently find the legal effect of this record to be the same, and the possession by the Marshal to be unlawful and not to be *in custodia legis.*

THE PROCESS WAS VOID.

FIRST. THE PROCESS WAS VOID AS HELD BY THE U. S. DISTRICT COURT.

By reference to the monition and warrant of arrest, dated the 15th day of November, 1895 (on page 62 of the Record), which was the process under which the Marshal took the "Laurada" into custody on the same day (p. 63, folio 82 of the Record), it will be noticed that the Clerk's signature was signed as follows:

"E. M. SEABROOK,
"C. D. C. U. S. S. C.,
"Per JULIUS SEABROOK, Dep. Clk.
"(Seal) U. S. Dist. Court, Dist. S. C."

It will be noticed that forthwith J. P. K. Bryan, Proctor for the claimant, the S. S. "Laurada," made a motion to set aside

process and warrant of arrest of the said steamship, on the ground that said process and warrant of arrest were not signed by the Clerk or Deputy of Clerk of this Court (which motion does not appear in the record, but which motion is referred to in the answer to the said motion of the libellant's Proctor, filed the 6th day of December, 1895, p. 65, folio 85 of the Record), in the following words:

"Trenholm, Rhett and Miller, Proctors for libellants, replying to the motion of J. P. K. Bryan, for claimant of steamship 'Laurada,' to set aside process and warrant of arrest of said steamship on the ground that said process and warrant of arrest were not signed by the Clerk or Deputy Clerk of this Court, deny the ground set forth for said motion, and on the contrary, allege that said process and warrant of arrest were duly signed and sealed by a Deputy Clerk of this Court.

"TRENHOLM, RHETT AND MILLER,
"WING, PUTNAM AND BURLINGHAM,
"Proctors Libellants.

"Dec. 6, 1895, Charleston, S. C."

This motion was decided by the Court, as we have seen, "that the process herein was void" (p. 70, folio 92, Record).

Independently, however, it appears at the trial of this cause that this process of arrest and monition (p. 62), was void by the testimony of Julius Seabrook, the Deputy Clerk, contained on pages 39 and 40, which is as follows:

"JULIUS SEABROOK, sworn:

By Mr. Bryan:

Q. (Handing the witness the monition in the case of *John E. Ker & Company* v. *The Steamer "Laurada,"* dated 15th November, 1895): Will you look at the writing at the bottom of that monition "E. M. Seabrook, C. D. C., U. S., S. C., per Julius Seabrook, Deputy Clerk," will you say in whose handwriting that is? A. That is in the handwriting of my brother, J. D. Seabrook.

Q. Whose handwriting is it? A. I recognize it as the handwriting of J. D. Seabrook, my brother.

Q. Do you call yourself Mr. Julius Seabrook now? A. I did not write it.

Q. At that time where was Mr. E. M. Seabrook, Clerk of the United States District Court, on the 15th November, 1895? A. He was out of the District, in Atlanta, Ga.

Q. What was his condition? A. He was sick at the time.

Q. How soon after that did he die? A. About within the next ten days.

Q. Where were you, you Julius Seabrook, Deputy Clerk, where were you on the 15th November, 1895? A. I was not in Charleston, and my recollection is that I was in Atlanta.

Q. With your sick father? A. Yes, sir.

Q. What was your brother's occupation at that time? A. As I remember he had been engaged in rock-mining shortly previous to that time, and as I remember it he was still engaged in rock-mining at that time.

Q. How did he come to go into the office at that time?. A. I was called off in the emergency of my father's sickness, and expected to be absent.

Mr. Cochran: We object to all of this testimony on the ground that this record can not now in a suit between other parties be attacked collaterally in that way; it is regular on its face.

Mr. Bryan: Q. During this emergency you asked him to go in and look after the office for you? A. I asked him to take charge of the office for a few days during my absence, and to file any papers that came in.

Cross-Examination.

Q. He had authority to sign your name for you? You told him to sign your name? A. I told him to mark any papers filed, that is my recollection. I told him to receive and mark "filed" any papers that came in, and if it was necessary to issue any writs, subpœnas or writs, to sign the Clerk's name to them.

Q. You told him that? A. I told him that; there was very little going on at the time, it was in the fall, and I counted on nothing turning up during my absence; I would not be absent more than a few days.

Q. Your brother was not a deputy? A. I was the Deputy Clerk of the office, and had been Deputy for some years previously. * * *

The warrant of arrest of the "Laurada" was issued, therefore, when both the Clerk and his Deputy Clerk were out of the District of South Carolina, and it was issued, signed and sealed by a private unofficial person, who had no power to do an official act; and could not be delegated by the Clerk or Deputy Clerk in his absence to act for him, for the power is lodged only with the Court itself by Statute, and the express provision of the law is the writ shall be *signed* by the Clerk (or Deputy).

Section 555 of the Revised Statutes of the United States, p. 93, provides that "A Clerk shall be appointed for each District Court by the Judge thereof, except in cases otherwise provided for by law."

Section 558 provides that: "A Deputy may be appointed by the Court on the application of the Clerk."

Rev. Stat., U. S., p. 94.

Section 911 provides that: "All writs and processes issuing from the Courts of the United States shall be under the seal of

the Court from which they issue, *and shall be signed by the Clerk thereof.*"

Rev. Stat. U. S., p. 174.

ADMIRALTY COURT HAD NO JURISDICTION.

I. The charter of the "Laurada" to J. E. Ker & Co., annexed to the libel to J. E. Ker & Co., against the "Laurada," at pages 55 to 60 of the Record, has the following provisions:

1. "The owners agree to let, and the said charterers agree to hire the *said steamship* from the time of *delivery*" (p. 55, Record).

2. "The charterers to pay 150 pounds per calendar month" (p. 56, Record).

3. "The hire to continue *until her delivery* to owners" (p 57).

In section four of the charter these words occur:

"That the captain, although appointed by the owners, shall be under the orders and direction of the charterers, as regards employment, agency or other arrangements" (p. 57).

Under a charter party containing these clauses, the charterers, J. E. Ker & Co., were in possession and became the owners *pro hac vice;* the master became their servant; the charterer was the *carrier* doing his own business, and any default of the master was theirs—the charterers—own default, and all allegations in the libel alleging any default, in law, are allegations alleging the default of the charterers the libellants themselves, and no cause of action is stated legally averring a breach of the charter, all the acts stated being the libellant's own acts done through their own servants and agents; therefore, there is no *lien* upon the ship and no cause of action *in rem* is stated, and the Court is without jurisdiction *in rem,* being without jurisdiction of the subject matter *in rem.*

This is again, independently, another reason why the monition and warrant of arrest of the "Laurada" is utterly void, and no justification to the Marshal, even if the same had been signed by the Clerk.

II. Again, the libel avers the damage done to *cargo* as follows:

> "The said vessel was delayed in her arrival at the port "of Kingston, Jamaica, and in consequence thereof the "said cargo of fruit, *awaiting her arrival,* as aforesaid, "was seriously injured and damaged" (p. 54, folio 71, Record).

It is not alleged that this cargo, injured and damaged, was ever laden on board the "Laurada." The injury and damage alleged was of "cargo awaiting her arrival."

There is, therefore, again, no maritime privilege, no hypothecation of the vessel, no lien thereby created on the steamer, and therefore, no cause of action *in rem* is stated. And the Admiralty Court had, therefore, no jurisdiction *in rem* of this subject matter. This is independently another reason for the Court's decree that it had no jurisdiction *in rem.*

AUTHORITIES SHOWING MARSHAL A TRESPASSER.

ADMIRALTY PROCEEDING IN REM. VOID PROCESS.

"A warrant of arrest for seaman's wages, issued by the Clerk in the absence of the Judge, contrary to the provision of a rule of Court, is void."

The Berkeley, 58 Fed. Rep., p. 920 (Rubric). Simonton, J.

"I am of the opinion that the original process in this case was void, and so continued notwithstanding the stipulation; that, as all the subsequent proceedings depended on this process, they were *coram non judice.*"

Idem, p. 923.

The Supreme Court of the United States has finally settled the law governing Federal Courts in a case like this. The Court say:

"Such is the law in either case, in respect to the Court, which acts without having *jurisdiction* over the subject-matter; or which, having jurisdiciton, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case *coram non judice.* (Cole's case, John W., 171; *Dawson* v. *Gill,* 1 East, 64; *Smith* v. *Boucher,* Hardin, 71; *Martin* v. *Marshall,* Hob., 68; *Weaver* v. *Clifford,* 2 Bul., 64; 2 Wils., 385.) In both cases, the law is, that an officer executing the process of a Court which has acted *without jurisdiciton over the subject-matter,* becomes a *trespasser,* it being better for the peace of society, and its interests of every kind, that the *responsibilty of determining whether the Court has or has not jurisdiction should be upon the officer,* than that a void writ should be executed. This Court, so far back as the year 1806, said, in the case of Wise and Withers, 3 Cr., 331, p. 337, of that case: "It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal in a case clearly *without its jurisdiction, can not protect the officer who executes it. The Court and the officer are all trespassers."* (2 Brown, 124; 10 Cr., 69; Marks Rep., 118; 8 Term R., 424; 4 Mass. R., 234; *Dynes* v. *Hoover,* 20 How., pp. 80, 81.)

"In such cases, everything which may be done is void—not voidable, but void; and civil Courts have never failed, upon proper suit, to give a party redress who has been injured by a void process or void judgment."

Dynes v. *Hoover,* 20 How., 81.

"The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them, that the subject matter was within the jurisdiction of the Court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceedin, either before the same Court, to set them aside, or in an appelate court. If there is a total *want of jurisdiction,* the proceedings are void and a mere nullity, and confer no right, *and afford no justification,* and may be rejected when collaterally drawn in question."

Thompson v. *Tolmie,* 2 Pet., 163.

"Before adverting to the constitutional question, there is another feature of the order which calls for remark. The Court held that it had *no jurisdiction* whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be, and the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the Court."

The Mayor v. *Cooper,* 6 Wall., pp. 250, 251.

PARTY INJURED CAN SUE ANY OR ALL WRONG-DOERS—TRESPASSERS.

This is the Rule announced by the Supreme Court of the United States:

"Different modifications of the rule also arise where the controversy grows out of the tortious acts of the defendants. Where a trespass is committed by several persons, *the party injured may sue any or all of the wrong-doers,* but he can have but one satisfaction for the same injury, any more than in an action of assumpsit or a breach of contract.

"Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrong-doers jointly, or *he may sue them all or any one of them separately;* but if he sues them all jointly, and has judgment, he can not afterwards sue any one of them separately; or, if he sues any one of them separately, and has judgment, he can not after-

wards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy.

"Where the injury is tortious, the remedy may be joint or several; but the rule in this country is that a judgment against one without satisfaction is no bar to an action against any one of the other wrong-doers. *Lovejoy* v. *Murray*, 3 Wall., 1; S. C., 2 Cliff., 196; *Livingston* v. *Bishop*, 1 Johns. (N. Y.), 290; *Drake* v. *Mitchell*, 3 East, 258."

Sessions v. *Johnson*, 95 U. S., pp. 348, 349.

We submit, therefore:

(1) The defendant was liable for damages of detention of "Laurada" for twenty-one days, as admitted.

(2) That the defendant was a wrong-doer and trespasser, together with the United States Marshal and those acting under him; and the defendant is not relieved of liability by the wrong of his co-trespasser and wrong-doer—the Marshal.

(3) That the Court below erred in directing a verdict, and that the judgment should be reversed.

J. P. K. BRYAN,
Counsel for Plaintiff in Error, Roxana S. Ker.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

GEORGE D. BRYAN, AS COLLECTOR OF THE PORT OF CHARLESTON, PETITIONER,

vs.

ROXANA S. KER, EXECUTRIX OF W. W. KER, DECEASED.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF.

The respondent, Roxana S. Ker, Executrix of W. W. Ker, deceased (the plaintiff in the Circuit Court below), by J. P. K. Bryan, her counsel, respectively submits to this Court the following reasons why the writ of *certiorari* should not issue from this Court to review the decision of the Circuit Court of Appeals, for the Fourth Circuit, in the above entitled cause, reversing the judgment of the United States Circuit Court, for the District of South Carolina.

STATEMENT OF THE CASE.

This action was brought in the Circuit Court of the United States, for the District of South Carolina in 1896 by Wm. W. Ker, against George D. Bryan, Collector of the port of Charleston, for damages in the sum of five thousand ($5,000.-00) dollars, for the alleged seizure and detention of the steamship "Laurada," which was owned by W. W. Ker, the plaintiff. Afterwards, upon the death of W. W. Ker, the plaintiff, his widow and executrix, Roxana S. Ker, was substituted as plaintiff.

The cause of action, as stated in the complaint, (pp. 2 and 3 Transcript of Record), was that the "Laurada" being a merchant vessel of the United States, on the 16th day of November, 1895, was unlawfully seized and wrongfully detained by the defendant, claiming to act as Collector of the port of Charleston, who refused to allow the said steamship to proceed in the due fulfilment of her freight engagements for twenty-one days, from the 16th November, 1895, to the 6th of December, 1895, to the damage of the said plaintiff, the owner of the said steamship, the sum of five thousand ($5,000.00) dollars. (See pp. 2 and 3 Rec.)

The defendant, George D. Bryan, Collector of the port of Charleston, answered, setting up two defenses, as follows:

First defense: "That true it is, that acting under instructions received from the secretary of the treasury of the United States, this defendant (the Collector) caused one of the inspectors to go on board the "Laurada," and *formally take possession or charge of said* vessel, and he *kept her in his custody and under his control for twenty-one* days," and he alleges as a probable cause of such detention, that she was about to violate the neutrality laws of the United States. (P. 5 Tr. of Rec.)

Second Defense: The defendant alleges that "no injury or damage resulted to the plaintiff thereby, the said "Laurada" being in the custody of the Marshal, under the libel issued out of the District Court, for the District of South Carolina at the suit of John E. Ker & Co., vs. the steamship "Laurada," and that said vessel was seized under said libel on the 15th of

November, 1895, and was not released by him until the 18th December, A. D., 1895.

On these issues, the cause came to trial to the Circuit Court of the United States on the testimony, which is contained in the Record.

In addition to the admission of the defendant in the answer, that "this defendant caused one of the inspectors to go on board the 'Laurada' and formally take possession or charge of said vessel, and kept her in his custody and under his control for twenty-one days." (P. 5 of the Rec.) There was put in evidence by the plaintiff, the letters that passed between senator M. C. Butler, counsel for the S. S. "Laurada," and George D. Bryan, defendant, Collector, on pp. 80, Record, as follows:

Charleston, S. C., Nov. 20, 1895.

"Hon. Geo. D. Bryan,
Collector of Customs,
Charleston, S. C.

My Dear Sir:

We are informed that *you* are detaining the steamer 'Laurada,' on behalf of the United States,

We are desirous that she shall forthwith proceed and therefore beg to inquire of she may do so now, as we do not wish to advise conflict with the instructions of the Government of the U. S. We request an early reply.

Very truly yours,
M. C. Butler,
Counsel for S. S. 'Laurada.'"

"Office of the Collector of Customs,
Port of Charleston, S. S.

November 20, 1895.

"Hon. M. C. Butler,
Counsel for S. S. 'Laurada.'

My Dear Sir:

Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I am 'detaining the steamer "Laurada" on behalf of the United States.'

I could not permit her to proceed as indicated in your letter as my instructions are to detain her.

Yours very truly,
G. D. BRYAN, Collector."
(P. 80, Record.)

The defendant introduced in evidence the record of the United States District Court for the District of South Carolina, In Admiralty, in the case of John E. Kerr & Co., vs. the S. S. "Laurada," libel *in rem*, (pp. 52 to 70, Tr. of Rec.) more particularly relying on the warrant of attachment of the "Laurada," found at page 62 of the Record, to sustain the second defense, that the "Laurada" was in the custody of the United States Marshal.

It further appeared as a part also of the said Record, in the libel suit *in rem*, in Admiralty, that forthwith the Proctor for the claimant of the steamship "Laurada," moved "to "set aside the process and warrant of arrest of the steamship "on the ground that the said process and warrant of arrest "were not signed by the Clerk, or Deputy Clerk of this Court," and that the libellants replied to the same on the 6th day of December, 1895. (P. 65, Tr. of Rec.) Pending this motion, the "Laurada" was discharged on bond on the 12th day of December, 1895. That the cause proceeded no further, and finally, on the hearing of the said motion in the United States District Court, in the said suit of John E. Ker & Co., against the S. S. "Laurada," the Admiralty Court dismissed the libel, after hearing, on the following ground:

"Whereupon it is now ordered, adjudged and decreed that "the libel herein be dismissed for want of jurisdiction of the Court *in rem* in this cause, and *process* herein being void." (P. 70, Tr. of Record.)

It thus appeared that in the record introduced by the defendant, that the District Court in Admiralty had decreed finally that the Court was without jurisdiction, and that the process, to-wit: the attachment *in rem* was *void*. (P. 70, Tr. of Record.)

It further also appeared by oral testimony of Julius Seabrook, Deputy Clerk at the trial of the cause that the signature to the said attachment, to-wit: *"E. M. Seabrook, C. D. C., U. S., S. C., per Julius Seabrook, Deputy Clerk,"* was not the signature of

Julius Seabrook, Deputy Clerk, or of any officer, but was written by a brother of the Deputy Clerk, a private non-official person, who had been left in the office in Charleston, to look after same, and that both the Clerk, E. M. Seabrook, and Julius Seabrook, the Deputy Clerk, were at the time of the issuance of the warrant not within the District of South Carolina, but were both in Atlanta, Ga., in another District, where the Clerk, E. M. Seabrook, was sick, and his son Julius Seabrook, Deputy Clerk, had gone to attend him. Pp. 39-41, Record.

By Rev. Stat. U. S., Secs. 555, 558, the only officials are the Clerk and Deputy Clerk, both appointed by the Court. They only had the power, the jurisdiction, to issue the warrant of arrest; but both were absent from the District.

It was evidently upon this state of fact that the Court of Admiralty had previously decreed the libel to be dismissed, on the ground of the want of jurisdiction *in rem*, the process being *void*. (P. 70, Record.)

The oral testimony further showed that the Collector put his inspector aboard the steamship, and the inspector was on board the vessel just as the Marshal's Deputy was, that is, both the Inspector and the Deputy Marshal were aboard, and they did not attempt to take the vessel away one from the other, and they did not turn each other off, nor try to do so. (See testimony of the Deputy, p. 30, fol. 39, Tr. Record, and p. 31, fol. 40, Tr. Record.)

On this state of fact the United States Circuit Court directed the jury to find a verdict for the defendant on the ground that the vessel was not in the possession of the defendant, the Collector of the port, but was in possession of the Marshal and the Collector was not responsible, and directed a verdict for defendant. (P. 82, fol. 107, Record.)

Upon exceptions 84, fol. 109, taken, and upon assignments of error (pp. 84 to 89, Record) the case was heard in the United States Circuit Court of Appeals, who reversed the judgment on the ground that the process of attachment in rem, under which the Marshal assumed to take custody of the vessel was *void*, and conferred no authority upon him to take possession, and for that reason the vessel was not in the custody of the law, and was not out of the legal possession

of the owner, and that the defendant, the Collector, could not set up the fact of the Deputy Marshal being on board of the ship under a void warrant as a legal defense to his own alleged and admitted detention of the vessel. (See opinion.)

We submit on behalf of the respondent, Roxana S. Ker, the correctness of the decision of the United States Circuit Court of Appeals for Fourth Circuit, Judges Pritchard, Waddill, and Boyd, concurring in reversing the judgment of the Circuit Court, directing a verdict for defendant.

The authorities cited by the petitioner do not sustain his contention. In all of these cases the warrant was issued by an officer having power and jurisdiction to issue the warrant, and the process was fair on its face, and in these cases the court held that any defect, such as the nature of the affidavit preceding the attachment, or any error of judgment on the part of the officer having authority to issue the warrant, did not affect the officer serving the warrant, and it was voidable only. The petitioner has not cited any cases like the case at bar where the person issuing the warrant is not an officer having lawful authority to issue the warrant, but a private, unofficial person, and not the clerk, or the deputy clerk. In such cases, the Court have always held because of the want of power in the person issuing the warrant, the warrant was void. In the same way this court has held that if the court had jurisdiction, its judgments however erroneous are only voidable. But if the court had no jurisdiction, its judgment and execution founded thereon are void.

The following are the cases cited by the petitioner:

In *Matthews v. Densmore*, 109 *U. S., p.* 216, the writ of attachment was issued by an officer, the clerk of the court, and in that case it was attacked because of mistakes in the affidavit, that is, in the preliminary acts which preceded its issue, but the power of the clerk to issue the affidavit was not questioned. This Court say:

"It would seem that the mandatory process of a court of general jurisdiction, with authority to issue such a process, and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the court and are within its jurisdiction, cannot be

absolutely void *by reason of errors or mistakes in the preliminary acts which precede its issue.*" (P. 219.)

Again, in *Matthews v. Densmore*, the court quoted with approval further from *Cooper v. Reynolds*, 10 *Wall*, 308, as follows:

"The precise point as to the validity of this writ of attachment was under consideration n this court in the case of *Cooper v. Reynolds*, 10 *Wall*, 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been often quoted since, and is conclusive in the Federal courts in regard to the validity of their own procession when collaterally assailed, as in the present case.

"The court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits *in rem* and *in personam*, in answer to the question; On what does the jurisdiction of the court in that class of cases depend? Answers it thus:

"It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely in rem. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. *If the writ of attachment is the lawful writ of the court*, issued in proper form, under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into court the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities, but the writ being issued and levied, the affidavit has served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property."

It will be noted that the precise question was thus decided

by the court, that is, before the court could get jurisdiction *in rem*, or before the officer could be protected, the writ must not only be issued in proper form and appear regular, but it must be *"the lawful writ of the court"* that is, issued by the officer having authority of the law to issue it.

"If the officer whose duty it was to issue the writ" did not issue the writ, but it was issued by some third person, a private, unofficial person, then it is not the *"lawful writ of the court,"* it is void and jurisdiction fails. If the officer whose duty it was to issue the writ, did actually issue the writ, although he failed in some manner to observe all the requisite formalities, and although he may have erred in his judgment, this would be a lawful writ of the court, not void, but only voidable.

In *Connor v. Long*, 104 *U. S.*, 228, the fact was that the warrant of attachment was duly issued to the sheriff, who sold the perishable goods, and paid the same to the plantiff's attorney; no question was made that the officer who issued the writ of attachment had no power to issue the same. It was upon these admitted facts that this court held that the sheriff was not liable for proceeding under it, and could not be sued for the amount of the proceeds of sale paid to the plaintiff's attorney.

The rule for which we contend, as stated in that case, is as follows:

"The rule of duty and of liability is thus stated with admirable force by Hosmer, C. J., in Watson v. Watson (Conn. 140, 146): 'Obedience to all precepts committed to him to be served is the first, second, and third part of his duty; and hence, *if they issue from competent authority* and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command.'" (Pp. 237-238.)

The same principle was decided by this court in the case of Buck vs. Colbath, 3 Wall. 334;

"It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, *and it was a valid process when placed in the officer's hands*" * * * "then such process is a complete protection to him." (P. 343.)

It is necessary, therefore, that the process must be valid when placed in the officer's hands.

In the case of *Marks vs. Shoup*, 181 *U. S., p.* 562, the question was made that the attachment was void, because of a defect in the affidavit. This court, however, decided, as it had already decided in *Matthews vs. Densmore*, 109 *U. S., p.* 216, that such a defect did not render the warrant void, but only voidable, on the evident fact that the *authority of the clerk issuing the warrant* had not been attacked, and inasmuch as the clerk, the officer charged with the duty of issuing the warrant had the power, that is, the jurisdiction to issue the warrant, and had officially acted in issuing the warrant, his official action, however erroneous or irregular it may have been, did not make the warrant void, but only voidable.

These are the decisions of this Court, cited by the petitioner to the effect that the Admiralty warrant of arrest of the "*Laurada*" in this case, issued by a private unofficial person, the brother of the Deputy Clerk in the absence of both the Clerk and the Deputy Clerk from the District of South Carolina, is a lawful writ of the court and protects the marshal, and puts the vessel in *custodia legis*. We submit that these authorities are to contrary. The other cases cited by petitioner are from the State Courts and if examined will show that they are to same effect. They are as follows:

In *Donahue v. Shed*, 8 *Met.* 326., (cited by petitioner).

"An action of trespass will not lie against an officer for serving a warrant issued in legal form by a court having jurisdiction, and directing him to arrest the party, even though the proceedings of the court in issuing the warrant may have been erroneous." (Rubric.)

In that case the warrant was "signed by the Justice." (See warrant, p. 327 Id.), and the court had jurisdiction of the offense. (P. 328.) Id.

In *Rex. v. Danser.*, 6, T. R. 242, (cited by petitioner). The sole question was whether the court had jurisdiction.

In *Millings vs. Russell, 23 Pa. St.* 189 (cited by petitioner.)

In this case again it was trespass against an officer who acted under an execution. The facts as stated by the court were: "It (the execution) was issued by *a Justice* of the Peace upon a judgment in attachment under the Act of

1842. The affidavit was irregular and so was the bond."

The court say: "It is a rule to which there is no exception that when a judgment is given by a court or Judge having jurisdiction of the subject-matter, its regularity cannot be inquired into in a collateral proceeding." If the *Justice* was wrong in issuing this attachment * * * the defendant could get redress only by *certiorari*. A ministerial officer may not be sued as a trespasser for simply obeying the command of the writ, regular on its face."

The execution was issued by the Justice having power to issue it though he may have acted erroneously.

In *Putnam v. Mann*, 3 *Wendell*, 202, (cited by petitioner) the constable was sued for levying execution. Here again the fact as stated by the court, was "The execution on which Putnam was arrested was issued *by the Justice*" (pp. 202, 203) whom the court declared to have jurisdiction, that is, power to issue the execution; the only question raised was whether the Justice acted wrongly (p. 205). The court announced the usual rule:

In *Earle v. Camp & Stone*, 16 *Wendell*, 562 (cited by petitioner).

The facts were in that case: "The attachment was issued by a *Justice* of the Peace" (p. 563).

The Court say: "A ministerial officer is protected in the execution of process issued by a court or *officer having jurisdiction* of the subject-matter, and of the process.

In Deyo v. Valkenburgh, 5 *Hill*, 242 (cited by petitioner).

The action (trespass) was not against an officer, but against attorney and his client for issuing *ca. sa.*, and in that case also the judgment and execution was issued by the clerk, a person having power to issue it.

Wilton Mfg. Co., v. Butler, 34 *Maine*, 421 (cited by petitioner).

In that case the officer was sued after serving an execution issued in a judgment of the court alleged to be obtained by fraud. The officer issuing the execution had power to issue it. The court say:

"An officer may be protected in the service of an execution, although there was such *irregularity* in the writ and in

the service of it, as would if pleaded, have abated the suit, etc." (Rubric, 431. See also p. 440.)

The Court said the officer was not accountable for any error in the judicial proceedings of the court which awarded it.

Bogert v. Phelps, 14 *Wis.*, 89 (cited by petitioner).

In that case the "warrant of attachment was issued to the defendant as sheriff by the *County Judge of Dodge County*," reciting it had been made satisfactorily to appear to him that defendant had been guilty of fraud in contracting the debt.

The Court say:

"It is not pretended that the warrant of attachment was bad on its face; nor that the *County Judge of Dodge County had not the power to issue* it. These two things being conceded it operated as a complete protection to the officer for all acts which he might lawfully to by virtue of it. It matters not how irregularly the County Judge may have exercised the jurisdiction conferred upon him by law, or how far he may have departed from the direction of the statute."

Id., p. 92.

This case again was decided upon the principle that the County Judge *had the power*; had the jurisdiction, to issue the warrant, and this protected the Sheriff.

In the case at bar, however, the Clerk of the United States District Court, or his Deputy Clerk alone had the power to issue the arrest warrant, and neither acted, but a private unofficial person issued the warrant.

In *Nichols v. Smith*, 26 *N. H.*, 298 (cited by petitioner).

In this case the general practice in the County was for attorneys to sign writs for the Justice in *civil* actions, on such a writ defendant *personally appeared* and pleaded general issue and after trial judgment was rendered; no exception to writ until after judgment had been rendered. The court held the defendant had waived the defect by pleading, and said:

"But objection to the jurisdiction which relates merely to the *persons* of the parties, to the proceedings by which they are brought into court, in general, only renders the proceedings voidable. The general principle is they may waive a right "which the law has provided for his particular benefit," (citing cases), and it has been holden that a party may waive any exception which he might take because of any failure

to comply with the law directing the mode by which parties are to be made *defendants* in legal *proceedings.*"

This, however, is not the law as to warrants seizing the person and property of the defendants.

The Court in that case further held:

"This Court has decided that writs signed by any other person than the Justice himself or by some person in his presence and by his direction are invalid." *Kidder v. Prescott,* (16 N. H.) 4 *Foster,* Rep. 263, and a "justice cannot confer upon anyone authority to sign writs or other process with his name in his absence, so as to make the process valid." (Pp. 301-302.)

A Fortiori in an action *in rem,* or against the person, a private person, (the officer being absent) has no right to issue a warrant to seize the property or person—it is a nullity—because not the act of the law.

In *Redmond v. Mullinax,* 113 *N. C.,* 505, 511, (cited by petitioner) the Court held a "summons" under the Code in a personal civil action, when issued by, but not signed by the Clerk, but containing his name as printed in the body of the paper, and *the defendant has entered an appearance,* the Court may amend by allowing Clerk to sign his name.

But the Court also held:

"We cannot extend the discretion of the Court so as possibly to include a case where counsel obtains from the Clerk a form of Summons, fills the blanks in the body of it and after procuring the signatures of sureties, on the undertaking, endorsed them, places it in the hands of the sheriff without giving to *the Clerk,* the opportunity to pass upon the sufficiency of the security for costs, as the Statute (The Code, Sec. 211) requires of him to do. The issuance of the summons in such a case is the act of the attorney, not of the Clerk, and the paper is void as process, and incurable by amendment." Sheppard v. Love, 2 Dev. (N. C.) 148.

In the last case (which was writ of arrest of persons), the Court held that "a writ signed by an attorney under a verbal deputation of the Clerk to all members of the bar, is a nullity."

And the Court say:

"Had the Sheriff attempted to exercise power under the paper and was in the act of making the arrest, when the authority was denied and force met force and death ensued, could the grade of homicide be affected by the subsequent assent or refusal of the Clerk to confirm the act?"

Ambler v. Leach, 15 *W. Va.,* 677 (cited by petitoner).

The facts were that the writ was issued by the Clerk in a personal action on debt, with a teste "witness, W. H. Hatches, Clerk" of our said Court but not signed by Clerk, and personally served and judgment thereon and *fi fa* issued, afterwards on sale of lands thereunder, the writ was questioned for the first time" (pp. 678, 679).

The defendant did not plead abatement and the Court held writ not void, but voidable only. The question was solely, did the proceedings make the defendants parties to the suit? The principle upon which the Court decided the cause, being a personal action is stated on page 684.

"These proceedings 'are not necessarily nullities, or void absolutely and incurably, because all the authorities all agree that they may be confirmed. And they are confirmed by the defendant appearing in the case, and submitting his case to the judgment of the court, or by pleading in bar to the action. If not confirmed by the defendant, they are void in the broadest sense of the word, and are mere nullities." (See Harris vs. Hardman, 14 How. 334, and cases cited.)

All these cases, cited from the State Court, but confirm the principle decided in the cases cited by petitioner from this Court, i. e.: that the warrant protects the officer when issued by a person having authority of law to issue it, and if such person or Court, acted erroneously, the writ is not void but voidable. But where there is no jurisdiction or power to issue the warrant in the person issuing it, the writ is void and no protection.

ADDITIONAL AUTHORITIES.

Cited by respondent (plaintiff below) against the granting of *certiorari.*

The petitioner has in his argument for certiorari confused void, and voidable process. Void process is that which is

issued without any authority of law. Voidable process is issued by authority of law, but some defect or irregularity exists in some preliminary step or formal particular. The petitioner, as we have shewn cites only cases of voidable process, but if we further examine the Statutes of United States and the decisions of the Courts other than those above cited, this warrant of arrest of S. S. "Laurada" was issued without any authority of law, and void. The Fourth Amendment of the Constitution of the United States, "The right of the people to be secure in their persons, houses, papers and *effects* against unreasonable searches and seizures, shall not be violated." And the Fifth Amendment guarantees "due process of law" as a protection of property.

In construing these Amendments in *Boyd vs. U. S.*, 116 *U. S., p.* 627, this Court quotes from the judgment of Lord Camden, which it declares to be one of the permanent monuments of the British Constitution, and foundation of our American system, as follows:

It was on the question of illegal warrant, and Lord Camden says:

"The great end for which men entered into society was to secure their *property*. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some *positive law* has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no

such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass."

Boyd v. U. S., 116 U. S., p. 627.

"Section 555 of the Revised Statutes of the United States, p. 93, provides that "A Clerk shall be appointed for each District Court by the Judge thereof, except in cases otherwise provided for by law."

"Section 558 of the Revised Statutes, U. S., provides that, "A Deputy may be appointed by the Court on the application of the Clerk."

Section 911 of Revised Statutes provides that: "All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, *and shall be signed by the Clerk thereof.*"

In Benedict's Admiralty, page 231, the official nature of the issuance of process is stated as follows:

"The issuing of the process being the *act of the Clerk,* the party or his Proctor is not responsible for its imperfections." (Page 231.)

If the issuing of process is the "act of the Clerk," then the Clerk *not* issuing the process, and *not* having signed or sealed the same, there is no legal process. There is no legal writ, the Court has not acted.

This Court holds the warrant is void, unless signed by the officer, having the power to issue it, declaring as follows:

"Hawkins, P. C., bk. 2, c. 13 § 21, follows Lord Hale in stating the necessity of the seal to a warrant of a justice of the peace, but what Lord Hale says is this (I Hale, P. C., 577): 'It must be under seal, though some have thought it *sufficient to be in writing, subscribed by the justice;*' and he refers to Dalton's Justice, wherein it is laid down that their warrant or precept in writing should be under the hand and seal, or *under their hand at least. First Ed.* 1680, 287."

Starr. v. United States, 153 *U. S.* 617-618.

"Blackstone states that the 'Warrant ought to be under the hand and seal of the justice (4 Bl. Con. 290), but Chitty's

note on that passage is that 'it seems sufficient *if it be in writing and signed by him,* unless a seal is expressly required by a particular act of Parliament,' citing Willes, 411; Buller, N. P. 83. And this is repeated in 1 Chitty, Crim. Law, 38."

Idem. p. 618.

See also State v. Vaughn, Harper (S. C.) 313; Davis v. Sanders, 40 S. C., 507.

In the *Confiscation Cases, 20 Wall,* 93, 111, this Court stated the statutory requisition as follows:

"Another objection urged against the proceedings in the District Court is, that the warrant, citation, and monition was not *signed by the Clerk* of the Court. It was attested by the Judge, sealed with the seal of the Court, and signed by the Deputy Clerk. This was sufficient. An Act of Congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do."

In that case, the signature of the deputy Clerk sufficied; but here there was no official act by any officer giving this paper to the Marshal. Neither the Clerk or his Deputy signed, or issued it.

In *Leas & McVitty,* 132 *Fed. Rep.,* 511, the Court say:

"In Middleton Paper Co., v. Rock River Paper Co., (C. C.) 19 Fed. 252, the State statute of Winconsin provided for garnishee process to he issued by plaintiff's attorney. It was held that in the Federal Court of that State this paper must be issued by the Clerk of the Court under his hand and the seal of the Court." (P. 511.)

"I think 911, Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a Federal Court it *must be signed by the Clerk,* and shall be authenticated in the manner therein set out." (P. 512.)

(Circuit Court of W. Va., Judge McDowell.)

In the case of *Middleton Paper Company v. The Rock River Paper Co., 19 Fed. Rep., 252,* the Court held as follows:

"All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, and shall be signed by the Clerk thereof."

"A process which has been issued by the attorney, when it should have been issued by the Clerk, is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons, the Court gets no *jurisdiction* of the case, and there is nothing to amend."

The Court say:

"The summons, notice, writ or whatever it may be called, by virtue of which a defendant is required to come into Court and answer, litigate his rights, and submit to the personal judgment of the Court, must be 'Process within the meaning of the law of Congress,' and the rule of the Court * * * And this makes the practice in this Court consistent and uniform, by which the action is begun, to be issued from the Court and allow the garnishee summons to be issued by the attorney. It is no doubt the policy of the law to keep process under the immediate supervision and control of the Court."

If the Clerk had issued the summons and failed to seal it, the Court could order it sealed. But no process, regular or irregular, has been issued by the *proper authority*. Hence it is that the Court gets no jurisdiction of the case, and there is nothing to amend by."

(Pp. 253-254.)

"A writ signed by an attorney under a verbal authority of the Clerk is a nullity."

"Where a writ is signed by an attorney under a verbal authority of the clerk, its subsequent ratification by him will not render it valid."

Gardner v. Lane, 14 *N. C.*, *p.* 53.

In *Covell v. Heyman*, 111 *U. S.*, 176, the Supreme Court quotes again the above passage, to-wit:

"To give jurisdiction to the District Court in a proceeding *in rem*, there must be a *valid* seizure, and an actual control of the *res* under the process." (P. 177.)

In the case of the *Resolute*, 168 *U. S.*, 437, the Court say:

"In order for the Court to have jurisdiction, there must be a maritime contract and that the property proceeded against is within the *lawful custody* of the Court."

This Court has declared an attachment without authority of law is void:

No "attachment can issue from a Circuit Court of the United States in an action against a national bank before final judgment in the cause; and if such an attachment is made on mesne process, and is then dissolved by means of a bond with sureties conditioned to pay to plaintiff the judgment which he may recover, given in accordance with provisions of the law of the State in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff."

Pacific Nat. Bank vs. Mixter, 124 U. S. p. 721.

"We are therefore, of opinion that the attachments in all the suits were illegal and *void because issued without any authority of law.*"

Idem, p. 728.

"In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal, and therefore, a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment * * * such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment is illegal and therefore void, so, also must be the bond which takes its place."

Idem, pp. 728-729.

Finally this Court has clearly stated the principle that governs here, as follows:

"Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals *or officers invested by law with authority* to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that *if the officer* or tribunal *possesses jurisdiction* over the subject-matter upon which judgment is passed, *with power to issue* an order or *process* for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full

and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the *officer* or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

Erskine v. Hohnbach, 14 Wall., p. 616, 617.
Stutsman Co. v. Wallace, 142. U. S., 309.

But this Court has never held that if a private person (not an officer) having no jurisdiction or power to issue process, should issue process, that there would be any protection in that case, for it is utterly void. This last case was cited and applied in the U. S. Circuit Court of Pennsylvania, where after quoting the language of Kent, to-wit:

"They are only responsible as trespassers when they act under the *authority of a person who had no jurisdiction in the case.*"

Phil. R. R. Co. v. Kenney, U. S. C. Ct., 19 Fed. Cas. 484.

The Court say:

"The same rule is settled as the law of Pennsylvania by the repeated decision of its Supreme Court. Moore v. Alleghany City, 6 Har. (18 Pa.) 55; Cunningham v. Mitchell, 67 Pa. St. 81. In the last of these cases, Mr. Justice Agnew says: "In the case of public officers an inferior acting within the scope of his warrant, when apparently regular, is always protected, *unless the authority issuing it was without jurisdiction*," i. e.: wthout lawful power to issue the warrant as was the Clerk's brother, a private person, in the case at bar.

Idem, p. 485.

The conclusion of the whole matter under all the authorities is:

If the officer had power to issue the writ, there would be protection, but if the officer had no power to issue the writ, there would be no protection. Where there is a want of power, there is no protection. If there is power, in the person issuing the writ, to issue the writ, and there is a defect or irregularity, the writ is voidable. If there is no power, as here, where a private, unofficial person attempted to do an official act, the writ is void, and there is no protection.

Again, the marshal did not receive this warrant of arrest from the clerk or the deputy clerk, the only officials who could legally act and issue it to him, they both then being out of the jurisdiction. The signature on the warrant, moreover, was not that of the clerk or the deputy clerk, and the marshal had, therefore, notice that in this vital particular, it was not regular on its face, even if this notice be necessary. He was charged by law with notice that the clerk and the deputy clerk were the only officials that could legally issue and sign the warrant and also charged by law with notice that they could not delegate their official statutory power; in the same way that the Judge himself, in his absence could not ask his brother, a private person, to act for him as Judge, and that an order not signed by the Judge, but by his brother for the Judge, was no authority of law.

This Court in *Whitside vs. United States*, 93 *U. S.*, 257, say:

"Individuals as well as Courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act." (And cases cited.)

In every aspect, therefore, there is no custody of law by the Marshal of the "Laurada" under the void warrant.

The United States Circuit Court of Appeals of the Fourth Circuit was therefore not in error in declaring The warrant of arrest a void warrant, and that the possession of the "Laurada" under it by the marshal was unlawful, and could not be invoked by the defendant collector (petitioner here) to relieve him from justifying his own admitted possession and detention of the steamship, for twenty-one days, and discharge his liability for damages as alleged in the complaint.

M. C. BUTLER,
J. P. K. BRYAN,
Counsel for Roxana S. Ker,
Respondent (Plaintiff below).

Oct., 1908.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

GEORGE D. BRYAN, COLLECTOR OF THE port of Charleston, petitioner,
v.
ROXANA S. KER, EXECUTRIX OF W. W. Ker, deceased.

No. 3.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This suit was brought October, 1896, by William W. Ker, the owner of the American steamship *Laurada,* to recover the sum of $5,000 damages, being the loss of the use and earnings of the steamship for the period from the sixteenth day of November, 1895, to and inclusive of the sixth day of December, 1895.

The charge against the defendant was that, claiming to act as collector of the port of Charleston, and in the name of the United States, he unlawfully seized the steamship *Laurada* under an alleged

authority and direction of the Government of the United States and detained her at the customhouse wharf in the harbor of Charleston for the period above named.

The defense to the action with which we are here concerned, as set up in the answer of the defendant, is "that true it is, this defendant, acting under instructions from the Secretary of the Treasury of the United States, caused the steam vessel '*Laurada*' to be formally detained by placing an inspector on board. But this defendant alleges that no injury or damage resulted to the plaintiff thereby, the said '*Laurada*' then being in custody of the marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Ker & Co. against the steamship '*Laurada;*' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895, and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant." (R., 4, 5.)

The facts with respect to the seizure by the marshal are that on the 15th day of November, 1895, John E. Ker & Co. instituted libel proceedings against the steamship *Laurada,* her engines, etc., and against Samuel Hughes, master, the object of the proceedings being to recover $10,000 damages alleged to have been suffered by reason of the violation of a charter party. When these libel pro-

ceedings were instituted in the District Court of the United States for the District of South Carolina, E. M. Seabrook was the clerk of the court, and his son, Julius Seabrook, was his deputy. The clerk on the 15th day of November, 1895, was in Atlanta, Ga., and was very sick, dying within the next ten days. The son, Julius, the deputy, was with his father in Atlanta. There was a second son, named J. D. Seabrook, who was asked by his brother to take charge of the clerk's office for a few days during the absence of the deputy and to file any papers that came in. The deputy told him to mark any papers "filed," and if it was necessary to issue any subpœnas or writs to sign the clerk's name to them. (R., p. 35.) The libel was evidently filed in the clerk's office while J. D. Seabrook was in charge of it. The monition was issued by him, in regular form, and was signed "E. M. Seabrook, C. D. C. U. S. S. C., per Julius Seabrook, Dep. Clk." (R., 55.) It was taken by the marshal, J. P. Hunter, and entered in the docket of the admiralty cases on the same day. H. J. Hickson, chief deputy United States marshal, served the writ on the same day, attaching the steamship *Laurada,* her engines, boilers, etc., and taking them all into custody, and serving a copy of the writ on the first mate of the vessel and posting a copy on the mainmast and one on the courthouse door. He placed a man on board the ship in the capacity of a guard, and this man remained on board in charge of the ship as guard until the 12th day of December, 1895, having cus-

tody of the ship as representative of the United States marshal.

In the libel proceedings, Samuel Hughes, master of the vessel, intervened for the interest of William W. Ker, as the owner of the steamship, and as the true and lawful bailee thereof for the said owner. This was done on the 3d day of December, 1895, and the claim of intervention was marked " filed " by Julius Seabrook, deputy clerk of the court. On the same day Hughes, as master, filed a stipulation for costs. Apparently, at some time after December 3 and on or before December 6, a motion was made by the proctor for the claimant of the steamship *Laurada* to set aside the process and warrant of arrest of said steamship on the ground that said process and warrant of arrest were not signed by the clerk or deputy clerk of the court. This motion does not appear in the record; that it was made does appear, and appears only from an answer to the motion made by the proctors for libelants on December 6, 1895, in which the motion is referred to and in substance stated, and the answer thereto denies the ground set forth for said motion, and, on the contrary, alleges that said process and warrant of arrest were duly signed and sealed by a deputy clerk of the court.

On the same day, December 6, 1895, the libelants filed an exception to the claim made by Hughes as master.

On December 12, 1895, the court on motion of the claimant's proctor " ordered that the marshal re-

lease from custody the S. S. '*Laurada*' upon receiving from claimant a bond in the sum of six thousand dollars, with sufficient surety to be approved by the collector of the port, conditioned to answer the decree of the court." (R., 58.) The bond was given and filed on December 18, and the vessel was released.

On the 5th of December, 1899, *over three years after the institution of the suit at bar* (R., 1), there was a decree in the original case, as follows (R., 60):

> This cause came on to be heard before the District Court of the United States for the District of South Carolina on the records, pleadings, and proofs herein.
>
> Whereupon it is now ordered, adjudged, and decreed that the libel herein be dismissed for want of jurisdiction of the court in rem in this cause, and process herein being void.
>
> WM. H. BRAWLEY,
> *U. S. Judge.*
>
> 5 Dec., 1899.
> We consent.
> TRENHOLM, RHETT & MILLER,
> *Proctors for Libellants.*

This was the end of the libel proceedings.

Recurring now to what was done by the collector, who is plaintiff in error here, it appears that on November 15, 1895, he received instructions by telegraph from the Acting Secretary of the Treasury of the United States to take measures for the de-

tention of the steamer *Laurada,* which was supposed to have landed a hostile expedition from the United States to Cuba, and on the 16th he was advised by the Acting Secretary of the Treasury that the steamer had just arrived at the port of Charleston, and he was directed to take measures for the detention of the vessel, and to report by telegraph. He consulted the United States attorney, and was advised to put an inspector aboard the *Laurada.* When this inspector boarded the vessel on November 16 he found her in the possession of the United States marshal, and so reported to the collector.

What followed is stated in the testimony of the collector (R., 29, 30):

> Q. What conversation did you have with the marshal about putting an inspector on board?
>
> A. As soon as it was reported to me that the marshal was in charge and was in charge when the customs inspector went aboard, I saw Mr. Hunter and told him the situation, and he said yes, he was in charge; and I said, then, "Have you any objection to my inspector remaining?" and he said "None whatever, Mr. Bryan;" and I went on further, and I said to Mr. Hunter "Will you be kind enough to let me know as soon as an order for the release of the *Laurada* is filed in your office?" and I did it for this reason, if you wish to know it: I knew that I could not oust the United States District Court of its jurisdiction and set aside its possession, and I wanted to know; there were instructions

from the department to detain her; then, if that order was filed—I did not know when it would be filed, might be filed at night, might go off surreptitiously. I wanted to know, so that I could continue. They took the vessel legally in possession; that is all the case.

Q. Did you withdraw your inspector?

A. I did.

Q. Did you withdraw your inspector before the marshal gave up the custody of the ship?

A. I did.

Q. Did you take the vessel away from the marshal at all in any way, shape, or form?

A. I did not at all; could not do it.

Q. Did you disturb the marshal at all?

A. I did not. I think it very well for it to come out. In consultation with Mr. Murphy, as I was instructed to do by the Government, we came to the conclusion that there was no evidence that we could get to convict this vessel, and I wrote to the department, told them exactly the state of affairs, and they instructed me to take my inspector off, and I took the inspector off on the 6th of December, and the marshal released the vessel on the 18th of December.

Q. Is there anything further that you care to say about it?

A. No; I don't think so. I think that is about the case in a nutshell, so far as I am concerned. I acted under instructions from the Government in putting the inspector on, and the marshal was in charge at the time.

On November 20, 1895, M. C. Butler, as counsel for S. S. *Laurada,* addressed the collector, saying (R., p. 68):

> We are informed that you are detaining the steamer "*Laurada*" on behalf of the United States.
>
> We are desirous that she shall forthwith proceed and therefore beg to inquire if she may do so now, as we do not wish to advise conflict with the instructions of the Government of the U. S. We request an early reply.

To which, on the same day, the collector made answer (R., 68):

> Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I am "detaining the steamer '*Laurada*' on behalf of the United States."
>
> I could not permit her to proceed as indicated in your letter, as my instructions are to detain her.

On the 6th of December, 1895, the collector wrote to Mr. Butler, as counsel for the steamship, saying (R., 69):

> I beg to inform you that, under instructions from the Government, I have to-day withdrawn my inspector from the '*Laurada,*' and she is free, so far as this office is concerned.

When the letter of Senator Butler to the collector was written, on November 20, the monition in the libel proceeding had been served, but no steps had been taken in the libel proceedings on behalf of the

owner of the vessel, the claim by Hughes, as master, not having been filed until December 3, 1895.

Suit against the collector did not come on for trial until December, 1907; meanwhile the plaintiff in that suit had died, and his widow, Roxana S. Ker, who was also his executrix, was substituted as plaintiff. On the trial of this suit, after the evidence was in, the court directed a verdict for the defendant upon the ground that the ship was not in the possession of the collector of the port but was in possession of the marshal, and the process under which he held possession appeared to be a lawful process. The case was then taken on writ of error to the Circuit Court of Appeals for the Fourth Circuit, and by that court was, in July, 1908, reversed and remanded for a new trial. The opinion of the court may be found in 163 Fed. Rep., 233.

The Circuit Court of Appeals held the monition issued in the libel proceedings to be absolutely void, and the marshal, taking and holding possession under it, to be a mere trespasser, and that the possession of the marshal did not oust the possession of the rightful owner so as to divest him of his right to maintain an action against the subsequent unlawful entry of another than the original wrongdoer. The court said in the opinion that they did not intend " to deprive the defendant of any right to contest the real ownership of the vessel or to set up by way of defense the bona fides of his action in seizing the vessel, the probable cause which may

have existed at the time, or any other legal defense," but "only decide that the possession of the marshal does not shield the defendant, nor was it a legal ground upon which to direct a verdict against the plaintiff" (p. 238).

The collector filed a petition for certiorari on October 24, 1908, and, the prayer being granted, the return to the petition was filed November 12, 1908.

ARGUMENT.

FIRST POINT.

THE MARSHAL'S POSSESSION WAS LAWFUL.

The marshal in the libel proceeding was in possession—and in possession lawfully—and was (in pursuance of the monition) the cause of any injury that may have been done the plaintiff below through the detention of his vessel. The alleged defect in the monition does not in the circumstances of the case affect this contention. This is so because—

I.

Not only was the monition in the libel proceeding fair on its face, but it came to the marshal from the proper source, with nothing to put him to any discretion as to its authenticity. It was his legal duty to enforce it, and in so doing he can not have been a trespasser.

In general, of course, a marshal is not liable for his official acts if the process on which he moves is fair on its face, even though not legally valid. That was settled by *Matthews* v. *Densmore* (109 U. S.,

216, 219), in which the principle was thus stated by Mr. Justice Miller:

> It (the writ of attachment) may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts.

This statement was quoted and applied by this court in *Marks* v. *Shoup* (181 U. S., 562, 563–564), and the same principle is generally recognized.

Hill v. *Haynes,* 54 N. Y., 153.
Erskine v. *Hohnbach,* 14 Wall., 613.
Throop on Public Officers, secs. 756–762.
Mechem on Public Offices, secs. 690, 745, 768–772.
Cooley on Torts, 2 ed., pp. 538–540.

This protection goes so far that some cases hold that the marshal's personal knowledge of the defect—which, of course, he may sometimes casually acquire—does not avoid the application of the rule. (See *Throop, Public Officers,* sec. 759; *Mechem, Public Offices and Officers,* sec. 745; 35 Cyc., 1752–1753.)

It is argued, however, and it was held by the court below, that the principle of *Matthews* v. *Densmore* does not apply, because, though this monition came to the marshal without any apparent flaw, it

had in fact been issued in the absence of the clerk and his deputy by a person left in charge of the office under instructions from the clerk to file any papers that came in, and if it was necessary to issue any subpœnas or writs to sign the clerk's name to them; and the monition is therefore argued to have not even color of legality and to be of no more authority to the marshal than if it had been issued to him by a stranger on the street or, as the court below said, by the plaintiff's attorney from his private office.

But this monition came to the marshal not only fair on its face but fair in its apparent origin. It was issued to him from the office of the clerk of the court. It may be that a marshal would not be protected if he executed a writ coming from an unofficial or unusual place, or in such a manner as would put a reasonable man on inquiry as to its authenticity; but that was not this case.

The principle of *Matthews* v. *Densmore,* and of the other authorities cited above, is not limited to the protection of the marshal only against hidden invalidities in the terms and bases of the writ. It applies equally and on the same grounds to hidden invalidities in the issue from the court.

The same considerations of public policy which relieve the marshal from the necessity of going behind the face of the writ must equally relieve him from the necessity of going behind its apparent origin. His obligation to take quick action and the

public necessity for such action preclude his going into the one investigation as well as the other.

His function is exclusively ministerial. As this court has said, with respect to such writs as the one in question, the officer executing them " has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described." (*Buck* v. *Colbath,* 3 Wall., 334, 343.)

Conner v. *Long* (104 U. S., 228) was perhaps quite as strong a case as that at bar. There a sheriff was held not liable in an action for wrongful conversion of property which he had sold under attachment even though at the time of the issue of the order for sale, the court had been ousted of jurisdiction by bankruptcy proceedings, and the order was invalid for the lack of jurisdiction. The court said (p. 240):

> The maxim to which they [purchasers at court sales] are subject is *caveat emptor.* It is not so with the sheriff, who as a public officer of the court obeys its precepts, regular on their face, without notice of any want or failure of jurisdiction; who is not at liberty to exercise any discretion, and has no choice but to obey.

The rigidity of the duty imposed on the marshal requires that he be protected by the doctrine herein contended for.

He must act on the face of the situation. He can not be an insurer of the formality of all that goes on in the office of the clerk of the court, or search that office for proof that every writ which

comes to him actually passed through the hands of the legal clerk or was physically written by him.

The volume of business in these days and the number of different courts from which process may be required of marshals would make any such investigation out of the question even if it were otherwise practicable. The officer now rarely receives process directly from the clerk's hands, but takes it from the receptacle provided for such purpose, and has a right to rely upon the genuineness of all process deposited there, and bearing the seal and *teste* of the court and apparent signature of the clerk. In answer to the argument that this signature was not that of the clerk or his deputy, and that this fact charged the marshal with notice of a defect of origin, it is sufficient to say that the marshal is not required to be an expert in handwriting, or to set up an inquisition as to the genuineness of signatures attached to writs which come into his possession safeguarded in the respects above set forth.

If an officer is required for his protection, whenever a writ emanating from the clerk's office is put into his hands which has every appearance of being regular and without defect, to institute an inquisition as to the various elements which give it integrity, then execution of process will be seriously delayed and the administration of law and justice unwarrantably hindered and obstructed.

And if defects as to some elements of the writ are not fatal—as they clearly are not, for witness de-

fects as to the seal—the same must hold as to all. It would be an absurd refinement to distinguish the present case.

This must appear from a statement of the doctrine under discussion. It is submitted that Cooley makes an accurate statement of it when he says:

> The process that shall protect an officer must, to use the customary legal expression, be *fair on its face.* By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it. (*Cooley on Torts*, 2d ed., 538.)

Having in mind the exigencies of business in a large court office, can it be denied that a writ, which actually comes from the office of the clerk of the court and is in every respect perfect in form, must appear to a marshal to be process lawfully issued under the above definition?

II.

The monition was not void but at most only voidable. It was colorable and could have been corrected by amendment in the suit in which it was issued.

This court has held that even where a writ was issued out of the office of a clerk of the wrong court the writ was not void, but merely voidable. This was in *Texas & Pacific Ry. Co.* v. Kirk (111 U. S., 486), where a writ of error was sought to be quashed which had been issued not merely by a wrong person in the proper clerk's office, but from a totally different office and clerk from that authorized by statute to issue it, namely, from the clerk of the Texas Supreme Court instead of the clerk of the proper Federal court. This writ had no color of validity in respect of its origin, the clerk of the Texas court having no legal authority to issue it; nor had it any color of validity on its face except that it ran "In the name of the President of the United States." The teste was that of the chief justice of the Texas court, the signatures were those of that chief justice and the clerk of that court, and the seal was the seal of that court. Nevertheless, the writ was held to be a colorable process, the motion to quash was denied, and a motion to amend was granted. Mr. Chief Justice Waite stated the case as follows:

> It commands the justices of the Supreme Court of Texas, in the name of the Presi-

dent of the United States, to transmit to this court for review their record and proceedings in a certain suit, which is properly described, and the return has been made and the cause duly docketed here. In *Bondurant* v. *Watson* (103 U. S., 278), relied on in support of the motion to dismiss, the writ did not purport to be issued in the name of the President, or under the authority of the United States. It was in reality nothing more than an order of the Supreme Court of Louisiana to its clerk to transmit the record and proceedings of that court in a certain cause to this court for review.

By sec. 1005 of the Revised Statutes, we are authorized to allow an amendment of a writ of error, when there has been a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, " and in all other particulars of form." This writ is signed by the clerk of the Supreme Court of Texas; and in *McDonough* v. *Millandon* (3 How. 693, 707) the question whether that was not sufficient was left open. But however that may be, we think all the defects which are complained of are such as come within the remedial provisions of the statute, and the amendments asked for may be made, save only that the seal and the signature of the clerk of this court, instead of the Circuit Court of the Western District of Texas, may be affixed to the writ (p. 487).

In *Bondurant* v. *Watson*, 103 U. S., 278, the opinion was also written by Mr. Chief Justice Waite,

and stated even more clearly the distinction between a merely voidable writ and one which is so without color as to be utterly void; and he indicates no difference between a colorable origin and colorable terms:

> The writ in this case was in the name of the chief justice of the Supreme Court of Louisiana. It bore the teste of that chief justice, and was signed by the clerk and sealed by the seal of that court. It had not a single requisite of a writ of this court. *Had it been even colorably issued from this court* it might have been amended under section 1005 of the Revised Statutes, which is certainly very liberal, and as follows [quoting the section]. But here *there is nothing which even purports to be a writ from this court,* and there is, therefore, nothing to amend. If we should permit the parties to change the seal, or the title, or to do everything else which this section allows, there would still be no writ, for *nothing has been done either in the name* of the President or under the authortiy of the United States. The supreme court of the State has directed that its record be certified here for examination and review, but no writ to that effect, either in form or substance, has ever issued from this court (p. 280; italics ours).

In *Miller* v. *Texas* (153 U. S., 535, 537) this court reiterated these principles where the clerk who signed the writ of error was the clerk of the Court of Criminal Appeals of Texas instead of the

clerk of the Supreme Court or of the appropriate Circuit Court of the United States.

In *Long* v. *Farmers' State Bank* (147 F. R., 360, 362) the Circuit Court of Appeals for the Eighth Circuit (Judge, now Mr. Justice, Van Devanter concurring) amended a writ of error issued by the district court clerk instead of the circuit court clerk.

In *Cotter* v. *Alabama G. S. R. Co.* (61 F. R., 747) the Circuit Court of Appeals for the Sixth Circuit held that a writ of error lacking a seal was amendable. In this case Judge (now Mr. Justice) Lurton further analyzed the ground of distinction between *Bondurant* v. *Watson* and *Texas & Pac. Ry. Co.* v. *Kirk* as follows:

> So a writ of error may be so void of color as a writ from the Appellate Court as to be unamendable. This was the case in *Bondurant* v. *Watson*. (103 U. S., 278.) In that case *it did not purport to be issued under authority of the Supreme Court of the United States or of the President of the United States.* It was the mere command of the chief justice of the Supreme Court of Louisiana, under his teste and the seal of his court, to send the transcript to the Supreme Court of the United States. That writ was held not to be even a colorable writ, and therefore unamendable. In the later case of *Railway Co.* v. *Kirk* (111 U. S., 486, 4 Sup. Ct., 500) the writ ran in the name

of the President of the United States, as prescribed by the form prepared under the act of 1792. It was defective, in that it was not tested by the Chief Justice of the United States nor signed by the clerk of the Supreme Court of the United States and did not bear the seal of either the Supreme Court or the Circuit Court. In place of these formalities it was tested by the chief justice of the Supreme Court of Texas, signed by the clerk of the Supreme Court of Texas, and sealed with the seal of that court. The court held that, as it purported to run in the name of the President of the United States, it was a colorable writ and subject to amendment. The writ under which the transcript of this cause was sent here is in all respects formal save in the absence of a seal. The seal of this court may now be affixed which, being accordingly done, the case is heard on its merits (p. 750).

In *Wolf* v. *Cook* (40 F. R., 432) Judge Jenkins in the Circuit Court for the Eastern District of Wisconsin, applied the same principles to the amendment of a writ of attachment which had been sealed with the seal of the wrong court.

In *Dwight* v. *Merritt*, 4 F. R., 614, C. C., S. D. N. Y., which may be here referred to, the summons was held to be a nullity and not amendable because it had been issued by the plaintiff's attorney over his own signature, from his own office, and without a seal; but Judge Blatchford in his opinion was

careful to indicate the vital distinction of such a case from the case at bar. He said:

> There must be a process to be amended. There must be something to amend, and to amend by. This paper is no process. The process which can be amended, under the power conferred, is process issuing from the court. *This paper never issued from the court. If it had in fact issued from the court and was signed by the clerk, but had no seal, or had a seal but was unsigned, what it had might, perhaps, be accepted as showing that it issued from the court, and the lacking particular might be supplied.* In *Peaslee* v. *Haberstro* it is said: "If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is, there is no summons in the nature of process known to this court." In that case there was no seal and no signature of the clerk, and the summons was set aside (p. 616).

The case is distinguished on the same general ground in *U. S.* v. *Turner* (50 F. R., 734–735).

We assume without discussion that if this monition was sufficiently colorable on the face of its terms and origin to be amendable, it was necessarily only voidable and not void, and must have sufficed to protect the marshal; and under the Revised Statutes on the subject, in the light of the above decisions, it is clear that the amendment might have been had in the original action if the plaintiff

had elected to apply for it. The applicable statutes are as follows:

R. S., section 954 (judiciary act of September 24, 1789, ch. 20, sec. 32):

> No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form, but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so ex- process or pleadings, upon such conditions of the parties to amend any defect in the process of pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

R. S., section 948 (act of June 1, 1872, ch. 255):

> Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues.

Under these statutes amendments in technical matters have been allowed with the utmost free-

dom, the act having been accepted as intending to prevent the obstruction of justice by artificial and technical rules and to bring cases to decision on their real merits. (*Matheson's Adm'rs* v. *Grant's Adm'r,* 2 How., 263; *McDonald* v. *Nebraska,* 101 F. R., 171, 177, C. C. A., 8th C.; *Parks* v. *Turner,* 12 How., 39, 46; *Walton* v. *Marietta Chair Co.,* 157 U. S., 342.)

In *Tilton* v. *Cofield* (93 U. S., 163, 167) the provisions were held to apply to attachment suits as well as to other suits, and to be of broad scope.

Considering the language and spirit of these statutes, how can it be said that there was substantial, rather than merely formal, defect in the issue of this monition? It had in fact the sanction of the proper officer and did in fact issue from him. These are the requirements that are substantial in character, and even these, as we have shown, were not considered vitally essential in the *Kirk* case. The process was in fact the act of the legal clerk. In any private case, on principles of agency, it would have been legally and theoretically his act. What was done by his direction by J. D. Seabrook was purely clerical, involving no discretion, and in actual effect it could have made no difference to anyone whether the assistant or the real deputy did the physical writing and transmitting of the paper. If the assistant had telegraphed for special authority in the particular case, or had made the journey to the clerk's bedside, the result must have been exactly the same.

In general, aside from the operation of these Federal statutes, it appears to be clear that such defects make the process at most voidable and not void.

In a South Carolina case the plaintiff issued a summons to revive a judgment, and the defendants objected to the revival on the ground that no judgment had ever been entered according to law, for the reason that the same was not signed or tested by the clerk of the court (Bowie), but by A. W. Jones, who styled himself "deputy clerk," but who was never regularly appointed as such. The court said:

> We agree with the referee and the circuit judge that we can not, especially at this late day and in this manner, declare that the judgment in the principal case was rendered absolutely void by the irregularity as to the manner in which it was entered. We do not see why the signature as "deputy clerk" by one who was never regularly appointed to that office should be more fatal than an entire absence of signature by or for or in behalf of the clerk. (See *Clark* v. *Melton,* supra; 4 Wait Prac., 671.) As was said by the Chief Justice in the case of *Clark* v. *Melton:* "To hold that the failure of the clerk in the matters suggested here destroyed the judgment would, in our opinion, be sacrificing substance to a shadow, and would overthrow established and adjudicated rights upon the merest technicality." (*King* v. *Belcher,* 30 S. C., 383.)

In this case the person assuming to act as clerk had no more authority to perform the functions of clerk than J. D. Seabrook had in the case at bar. Authority was as necessary to the validity of the judgment in that case as to the validity of the process in this case, and yet the court refused to hold that the judgment was void.

In *Ambler* v. *Leach* (15 W. Va., 677, 681, 685, 692) the first question before the court was, " Was the judgment of the lower court null and void because the summons in the suit in which the judgment was rendered was blank as to its date, and because it was not signed by the clerk or his deputy? " The Supreme Court of West Virginia answered the question in the negative. Its opinion is in part as follow:

> Lastly, as an example of proceedings of a court which are properly speaking voidable, we may refer to the cases where the process is defective, or is not properly returned. They are frequently treated as valid and effectual, until they are avoided by some act of the defendant. They are *prima facie* valid, but they are subject to defects, and the defendant may by proper proceedings defeat and destroy them. But such proceedings must be taken by the defendant, or in these cases the judgment pronounced will be valid. These proceedings must for some such defects be taken advantage of at the earliest opportunity, otherwise he waives his objection to the process, or return, for such defects. (685.) * * *

> *The authorities we have cited show that the decided weight of authority is against holding a writ absolutely void, because not signed by the clerk, or not having the seal of the court attached to it, or not being properly attached, or for not running in the name of the State, even where these things, or any of them, are required in the Constitution; but such defects in a writ render it only voidable* (p. 692). [Our italics.]

It is believed that a very close analogy exists between a case like the one under consideration and one where the writ was signed in blank by the clerk, and afterwards filled in by improper persons, for in either case the objection goes to the want of power to issue. A writ signed in blank by a clerk, long before the institution of the suit in which it figures, and afterwards filled out by another person, can no more be called the act of the clerk, so far as giving validity to the process is concerned, than can the monition which was issued in this case. If the law is that a writ is not absolutely void which is signed in blank by a clerk who afterwards goes away on his summer vacation, the signed blank afterwards coming into the hands of some one who fills it out, and performing the function of a writ in a case launched long after such signing, then it certainly is correct to say that the monition herein was not void.

Mr. Van Fleet, in his excellent monograph, thus states the law:

> Considerable litigation has arisen, collaterally, from the fact that process has been signed in blank by justices and clerks, and afterwards filled up by improper persons. As this involves a question of fact, and as the record appears fair on its face, the judgment * * * is never void. (*Van Fleet on Collateral Attack,* p. 332.)

It is stated by one text writer, and supported by the citation of many cases, that the authorities entirely agree that process issued entirely in blank—by which is meant the signing and sealing of the usual printed blank, or an entirely blank paper, and its delivery, to be written out or filled up by a party or his attorney—is regular and valid. (*Alderson on Judicial Writs and Process,* p. 147.)

In one case, which seems to be a severe test of the rule, but which simply shows the extent to which the courts go in protecting proceedings from collateral attack, a summons was sealed, signed, and delivered in blank to an attorney several months before it was filled out and placed with the sheriff for execution. The writ was not obtained for the particular action in which it was used, but for convenience in any suit the attorney might have occasion to institute, yet the writ was declared to be regular and valid. (*Sweet* v. *Circuit Judge,* 95 Michigan, 449.)

In another case it appeared that the justice before whom the case was tried had never signed the process, but that his name, written by himself on a slip of paper, had been thereto affixed by the attorney without his knowledge. It was held that this was a valid writ. (*Richardson* v. *Bachelder,* 19 Maine, 82.)

Cf. *Nickols* v. *Smith,* 26 N. H., 298; *Redmond* v. *Mullenax,* 113 N. C., 505; *Donohue* v. *Shed,* 8 Metc. (Mass.), 326; *Billings* v. *Russell,* 23 Pa. St., 189; *Wilton Mfg. Co.* v. *Butler,* 34 Me., 431; *Bogert* v. *Phelps,* 14 Wis., 88; *Griswold* v. *Connolly,* 1 Woods (U. S.), 193.

SECOND POINT.

In any event the detention of the vessel and the deprivation of use of which the plaintiff complains was the act of the marshal and not the act of this defendant.

Even if the marshal's possession was not lawful, it in fact existed. It was he, and not this defendant, who did the plaintiff's testator the injury of which he complains—the detention of the vessel and the loss of its use. These are the only damages alleged, and the defendant did not increase them in the least. He is not charged with any injury to the vessel itself. It clearly appears from the record that he did not cause any delay in the departure of the vessel. The marshal was in actual possession throughout the time the defendant's

officer remained on board, and the defendant did not even interfere with that possession of the marshal. On the contrary, according to his testimony, he entered upon the ship for the purpose of taking possession of it the moment the marshal should give up possession thereof. (Rec., 29.) This certainly resulted in no injury to the plaintiff, nor did it constitute an exercise of any dominion over the vessel. The transaction between the marshal and the collector amounted merely to this: The marshal being in possession of the vessel, permitted the collector (or what comes to the same thing, the collector's agent) to come on board the vessel, not for the purpose of taking possession of the vessel at that time, but for the purpose of taking possession thereof when he should be ordered to give up his possession.

Not even technical trespass would lie against this defendant, because the plaintiff's testator was not in possession. (*Ward* v. *Macauley,* 4 Term. R., 489, 490; *Wilson* v. *Barker et al.,* 4 Bar. & Ad., 614; *Hunt* v. *Pratt,* 7 R. I., 283; *Pollock on Torts,* 8th ed., 374.)

The case of *Wilson* v. *Haley Live Stock Co.* (153 U. S., 34, 44, 45), was cited by the court below as supporting the proposition that the owner may maintain trespass in respect to an injury committed against property in possession of a third party when that possession is wrongful. In that case the

gist of the complaint was that the defendants, after seizing and taking from the plaintiff a herd of cattle he was driving to market, drove said cattle great distances and greatly injured them, and compelled the plaintiff to pay the defendants a sum of money as a condition precedent to the return of the cattle. Mr. Justice Brown, after setting forth the complaint substantially as above stated, says:

> This is in its nature a count in trespass *de bonis asportatis* for the taking and detaining of personal property, and can only be supported upon the theory that plaintiff was either the owner of the cattle or entitled of right to the possession of them at the time of the trespass complained of. (1 Chitty on Pleading, 189, p. 45.) * * *
>
> Now, there is no evidence which would justify a jury in finding that plaintiff was the owner or entitled to the possession of the cattle until some time after the 27th of July, when the trespass is alleged to have been committed (p. 45).

The case merely decides that a party neither in the possession nor entitled to the immediate possession of property can maintain trespass in respect to an injury committed to the same. The question of whether the owner of the property may maintain trespass in respect to an injury committed thereto while the property is in the adverse possession of another was not before the court nor passed upon by it.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

WINFRED T. DENISON,
Assistant Attorney General.

LORING C. CHRISTIE,
Attorney.

OCTOBER, 1911.

○

BRIEF OF RESPONDENT.

Supreme Court of the United States.

October Term, 1910.

No. 85.

George D. Bryan, Collector of the Port of Charleston, Petitioner,

v.

Roxana S. Ker, Executrix of W. W. Ker, Deceased, Respondent.

J. P. K. Bryan, Counsel for Respondent, Roxana S. Ker, Executrix.

STATEMENT OF THE CASE.

This is an action at law in Circuit Court U. S. District of South Carolina for damages for the unlawful detention of the steamship "Laurada," brought in October, 1896, by W. W. Kerr, a citizen of Pennsylvania, owner of the steamship "Laurada," plaintiff, against George D. Bryan, a citizen of South Carolina, Collector of the Port of Charleston.

On the death of the plaintiff, his widow, Roxana S. Ker, executrix, in January, 1902, was substituted as plaintiff by the Circuit Court (pp. 6 and 7, Record).

The Circuit Court directed a verdict for defendant on the whole evidence. The plaintiff took this case to U. S. Circuit Court of Appeals, Fourth Circuit, on writ of error, assigning error in such direction of verdict by the Court.

The United States Circuit Court of Appeals reversed the judgment of the Circuit Court and remanded the case for a new trial on the merits.

The defendant, the Collector, brings the case here for review on writ of *certiorari*.

PLEADINGS.

The complaint alleged the citizenship of the parties, the ownership by the plaintiff of the steamship "Laurada," a merchant vessel of the United States, registered at the Port of Philadelphia (p. 2, Record).

"That on the sixteenth day of November, 1895, the said steamship 'Laurada,' being in the port and harbor of Charleston, proceeding with her officers and crew on board, in the due fulfillment of her freight engagements as a merchant vessel of the United States, the said George D. Bryan, *claiming to act as Collector* of the Port of Charleston, and in the name of the United States, *unlawfully* seized, and caused to be seized, the said steamship 'Laurada,' and under an *alleged* authority and direction of the Government of the United States, *unlawfully* and wrongfully *detained* the said steamship 'Laurada' at the Customhouse Wharf, in the port and harbor of Charleston, in the District of South Carolina, and refused to allow said steamship to proceed in the due fulfillment of her freight engagements, for the space of twenty-one days, to wit, from the 16th day of November, 1895, to and inclusive of the 6th day of December, 1895" (pp. 2, 3, Record).

"Fourth. That all such acts and doings of the said George D. Bryan, claiming to act as Collector of the Port of Charleston, and under an *alleged* authority and direction of and in

the name of the Government of the United States, were *without* warrant of law, and all such *alleged authority* and direction of the United States Government were *null* and void (p. 3, Record).

"Fifth. That by such wrongful and unlawful acts of the said George D. Bryan, claiming to act as Collector of the Port of Charleston, this plaintiff has been injured in the loss of the use and earnings of said steamship to his damage five thousand dollars" (p. 3, Record).

ANSWER.

1. The answer of defendant admits the allegations of citizenship, and that the defendant was at the time Collector of the Port of Charleston.

2. It puts the plaintiff upon proof of the ownership of the steamship "Laurada."

3. He denies the other allegations of the complaint, except as hereinafter stated, and specifically pleads as follows:

"That he denies each and every other allegation in said complaint contained, except as hereinafter stated; that true it is that acting under instructions received from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the 'Laurada' and formally *take possession* or charge of said vessel, and that he kept her in *his custody* and under his control for *twenty-one days*, but this defendant was then informed and verily believes that the said 'Laurada' was then about to depart from the United States, with arms, munitions of war and men, constituting a military expedition, and was intended by her owners to commit hostilities upon the subjects and property of the Island of Cuba, a colony of the kingdom of Spain, with which the United States was at peace, and that there was probable cause for *such detention* of the said vessel" (p. 4, Record).

For a second defense, the defendant more particularly pleads:

"Third. That true it is, the defendant, acting under instructions from the Secretary of the United States, caused the steam vessel 'Laurada' to be formally detained by pleacing an inspector on board. But this defendant alleges, that no injury or damage resulted to the plaintiff thereby, the said 'Laurada' then being in custody of the Marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Kerr & Co., against the steamship 'Laurada,' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895, and this defendant submits that any

damages sustained was by reason of such detention, and did not result from the act of this defendant" (p. 5, Record).

From the pleadings, therefore, it is clear, on the admissions thereof, that the defendant—

"Acting under instructions received from the Secretary of the Treasury of the United States of America, caused one of the inspectors to go on board the 'Laurada,' and formally *take possession* or charge of said vessel, and that *he kept her in his custody* and under his control for twenty-one days."

Second. That as a justification for such action, the defendant pleads:

"That this defendant was then informed and verily believes that the said 'Laurada' was then about to depart from the United States with arms, munitions of war and men, constituting a military expedition and was intended by her owners to commit hostilities upon the subjects and property of the Island of Cuba, a colony of the kingdom of Spain, with which the United States was at peace, and that there was probable cause for such detention of the said vessel."

The third defense of the defendant is, after admitting that he did "take possession of and keep the 'Laurada' in his custody and under his control for twenty-one days," is that "No injury or damage resulted to the plaintiff thereby, the said 'Laurada' then being in the custody of the Marshal under a libel issued out of the District Court for the District of South Carolina at the suit of John E. Kerr & Co., and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant."

On the whole evidence the defendant's attorney moved the direction of a verdict on the grounds set forth on page 81, more particularly, that the "Laurada" was then held by the United States Marshal under a process from the District Court in Admiralty and was *in the custody of the law*, and for that reason, being in the custody of the law, the steamship could not be in the custody of any other person.

The Circuit Court directed a verdict for the defendant, stating its position on pages 69-71.

The plaintiff then took the cause by writ of error to the Circuit Court of Appeals on the following assignments of error:

EXCEPTIONS.

The exceptions of the plaintiff are on pages 71-72 and 73 of the Record, which are the same as the Assignments of Error, on pages 73 and 75 of the Record, and are as follows.

FIRST ASSIGNMENT.

The Court erred in instructing the jury to bring in a verdict for the defendant on the whole evidence.

SECOND ASSIGNMENT.

The Court erred in holding and charging as follows: "As a mere question of law, it seems to me, that the plaintiff has no case, that the ship was not in the possession of the defendant, collector of the port, but was in the possession of the Marshal, and it appeared to be a lawful process, and if she was in the possession of the Marshal, then she could not have been in the possession of the defendant, collector, and the defendant, collector, therefore, is not responsible."

THIRD ASSIGNMENT.

The Court erred in not holding that the defendant, collector, was detaining the ship in point of fact.

FOURTH ASSIGNMENT.

The Court erred in holding and charging, "Now, it is argued, with great acuteness and with great ability, that the proceeding was unlawful from the beginning, that is, that the deputy clerk had no right to authorize his brother to sign and to put the seal of the Court upon the monition; and also argued that there was no jurisdiction, that Kerr & Company had no just claim against the ship which could be enforced in Admiralty, and that all proceeding is void. If this were a suit against the Marshal, all of that learning would be valuable, and probably the Court would hold that the Marshal could not be protected under a void proceeding, but that is not this case."

FIFTH ASSIGNMENT.

The Court erred in holding and charging, "The simple question here is whether or not the Marshal had possession; if the Marshal had possession, then the collector did not. Undoubtedly upon the proof the Marshal did have possession of the ship and the Government gets out in that way.

SIXTH ASSIGNMENT.

The Court erred in not holding that the Marshal of the United States for District of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest, in the case of Kerr & Company v. S. S. "Laurada," on the ground that the District Court of the United States for the District of South Carolina, sitting as a Court of Admiralty, had no jurisdiction in rem of the subject matter of

said suit, and that said warrant was, therefore, illegal, null and void, and was no warrant and due process of law to said Marshal.

SEVENTH ASSIGNMENT.

The Court erred in not holding that the Marshal of the United States for District of South Carolina was a trespasser in taking possession of and holding the S. S. "Laurada" under the warrant of arrest in the case of Kerr & Company v. S. S. "Laurada," on the ground that it appears by the evidence the said warrant of arrest was not issued out of said Court and signed, and the seal of the said Court affixed by the Clerk of the said District Court of the United States for District of South Carolina or his deputy, but that same was issued, signed, and the seal of said Court attached by a private, unofficial person, in the absence from the District of South Carolina of both the Clerk and the Deputy Clerk of the District of South Carolina, and said warrant of arrest was, therefore, illegal, null and void, and was no warrant and due process of law to said Marshal.

EIGHTH ASSIGNMENT.

That the Court erred in not holding, on the fact of this case, that in detaining the S. S. "Laurada," both the Marshal of the District of South Carolina, under the said warrant, in the case of Kerr & Company v. the "Laurada," and the said defendant, collector, were both trespassers, and as such joint trespassers and joint tort feasors were unlawfully holding and detaining said S. S. "Laurada," and that they were both and each of them, jointly and severally, liable for the damages for detention.

NINTH ASSIGNMENT.

That the Court erred in holding the defendant was saved from liability in this suit for his admitted detention of the S. S. "Laurada," because of the detention at the same time, by the United States Marshal, acting under a void warrant of arrest of said S. S. "Laurada," in the case of Kerr & Company v. the S. S. "Laurada."

The Circuit Court having directed a verdict for defendant and the United States Circuit Court of Appeals having reversed the judgment necessitates our stating the evidence on all the issues.

EVIDENCE.

I.

OWNERSHIP OF "LAURADA."

In proof of the allegation of the second paragraph of the complaint, the ownership of the "Laurada" by the plaintiff, Wm. W. Kerr, the defendant introduced in evidence:

1. The bill *of sale of* John D. Hart, owner of the steamship "Laurada," to William W. Kerr, of Philadelphia, dated 24th January, 1895 (pp. 61, 72, Record). The same being a certified copy under the seal of the Collector of the Port of Philadelphia (p. 63).

This certified copy of the record of the original bill of sale is introduced in evidence after the proof by Roxana S. Kerr, the executrix of William W. Kerr, the plaintiff, who testified that after diligent search for the original bill of sale of the steamship "Laurada," by John D. Hart to Wm. W. Kerr, dated January 24, 1895, that she had not seen it, and never had it in her possession at any time (p. 46).

2. The plaintiff also introduced in evidence a certified copy of the Register of the steamship "Laurada," dated 27th January, 1895, under the seal of the Collector of the Port of Philadelphia (pp. 63, 64), in which it appeared that: "W. W. Kerr, of Philadelphia, Pa., having taken and subscribed the oath required by law, and having sworn that he is the only owner of the vessel called the 'Laurada,' of Philadelphia," etc. (p. 73) * * * "Said vessel has been duly registered at the port of Philadelphia" (pp. 63 and 64).

3. The plaintiff also proved the death of William W. Kerr, the owner of the "Laurada," on January 31, 1901 (p. 46, Record), and leaving a last will and testament (pp. 65, Record), upon which letters testamentary were issued unto Roxana S. Kerr on the 17th January, 1902 (p. 66), who was substituted by the Court as executrix, plaintiff, in lieu of the original plaintiff, William W. Kerr, deceased, by order of the Court, 30th January, 1902 (p. 7, Record).

It appears, therefore, that the ownership of the "Laurada" was fully proven by the record evidence, as alleged in the complaint.

II.

"LAURADA," A MERCHANT VESSEL—NOT BUILT FOR WARLIKE PURPOSES.

That the "Laurada" was a merchant vessel of the United States, was also proven by the Register aforesaid, and more particularly established by the testimony introduced by the plaintiff, as follows, to wit:

By the testimony of C. W. TOWNSEND, a witness for the plaintiff, who testified as follows (p. 14, Record):

Q. Was she a merchant ship? A. Yes, sir.

Q. What kind of trading had she done here? A. Carrying pyrites cinders (p. 14).

Q. Was the "Laurada" a merchant vessel? A. Yes, sir.

Q. Was she a war vessel in any sense at all? A. I did not see anything to indicate a war vessel.

Q. Was she a war vessel or a merchant vessel? A. A merchant vessel.

Q. Was she built like a war vessel is built? A. No, sir.

Q. Was she an ordinary merchant vessel or was she manifesly built for warlike purposes? A. Merchant vessel (p. 15).

Also by the testimony of MR. THADDEUS STREET, who has been engaged in the shipping business for twenty-seven years, who testified as follows:

Q. What kind of a ship is she? Merchant ship? A. I would consider her an ordinary merchant vessel (p. 18).

Also by the testimony of MARTIN JOHANSEN, Second Officer of the vessel:

Q. Was she a merchant vessel or a war ship? A. She was a merchant vessel (p. 38).

And by PHINEAS E. THURSTON, Chief Engineer:

Q. Was she not a merchant vessel? A. She was a merchant vessel (p. 42).

There is no testimony whatever that she was not a merchant vessel, or that she was manifestly built for warlike purposes.

There is no testimony that at the time she was seized and detained, as admitted by the defendant, there was on board any arms or munitions of war or men constituting a military expedition; or that there was any such arms, munitions of war and men, constituting a military expedition anywhere with which she was about to depart the United States (as alleged in paragraph three of the answer, p. 5, Record).

On the contrary, the defendant himself, offering no evidence in support of the allegation of paragraph 3 of the answer, testifies (p. 29, Record):

"I think it very well for it to come out, in consultation with "Mr. Murphy, as I was instructed to do by the Government. "we came to the conclusion that there was NO EVIDENCE that "we could get to convict the vessel, and I wrote to the Depart-"ment, told them exactly the state of affairs, and they instructed "me to take my inspector off."

It is, therefore, established by defendant's testimony that the allegation in the third paragraph of the answer that at the time when the defendant did *"take possession* or charge of said ves-"sel and kept her in his custody and under his control for

"twenty-one days, he was informed and believes that the said "'Laurada' was then about to depart from the United States "with arms, munitions of war and men constituting a military "expedition, etc., and that there was probable cause for such "*detention* of said vessel," is, not only NOT sustained, but by the defendant's own testimony, "there was NO EVIDENCE to "convict the vessel."

On the contrary, it is also affirmatively established by the whole evidence that when she was seized in Charleston and detained by the Collector, for twenty-one days, this merchant vessel had come to Charleston for a cargo of pyrites, which was then ready for her, and that she was prevented from loading the same Her holds were empty, and having on board no arms or munitions of war and her crew being the ordinary crew of a merchant vessel.

This appears from the evidence of all the witnesses.

More particularly the evidence of *C. W. Townsend*, the stevedore, who was about to load the vessel, who testified that she had been several times in the port of Charleston carrying pyrites cinders from Charleston. Used for chemical purposes. He had loaded her about seven or eight times. Employed as stevedore to load her with a cargo of pyrites cinders. She went to the Savannah Railroad Wharf. Was ready to load her in the usual course of her previous loading. Was not allowed to load her. Prevented by the U. S. Customhouse officer. She was taken from the Savannah Railroad Wharf to the Customhouse Wharf (pp. 14-15).

Mr. *Thaddeus Street*, the Charleston Ship Broker, who handled the vessel, testified that he represented the parties in New York for the purpose of carrying a cargo. She was under charter for shipment of pyrites cinders from Charleston to some northern port.

Q. Was she, to your knowledge, as representing the shippers, was the engagement for her to take pyrites cinders? A. Yes, sir. We were proceeding to load the ship, we were prepared to do it (p. 17, Record).

He further says that the cargo stood on the wharf undelivered. I know the fact that the ship was moved from the Savannah Wharf and refused to take my cargo and the cargo was not taken by the steamship "Laurada" and went forward by the schooner, David Baird (p. 19, Record).

It also appears by the testimony of *Martin Johansen*, Second Officer of the "Laurada," when she came to Charleston from New York, she had no guns or cannon on board (p. 38). No soldiers were aboard of her while in Charleston. She had no munitions of war while she was on her way to Charleston. She came for a cargo of pyrites; her holds were empty when

she was seized (p. 38). That she went to Charleston from New York frequently. That her crew were ordinary sailors, and the captain had been her master for several months. About twenty-one men, two officers and the captain (pp. 38-39).

Q. Did you ever, while lying in the harbor, go down in the hold of the vessel and make a thorough examination of it? A. Yes, often.

Q. A careful examination? A. Working around cleaning and scraping, cleaning her hold.

Q. Were you on board of her continually during her stay in Charleston? A. Yes, sir.

Q. Was there any cargo taken on at Charleston? A. No, sir (p. 40).

Also the same testimony by *Phineas E. Thurston*, Engineer of "Laurada," who testified she was a merchant vessel, had no guns or cannon aboard or munitions of war or soldiers at any time in Charleston. She came for a cargo of pyrites; her holds were empty (p. 42). Her crew were ordinary sailors (p. 48).

It is my duty to inspect the hold of the vessels once every day to see whether there is any leakage (p. 44). Total number of crew twenty-one or twenty-three.

Q. Is it not true that this boat was seized at Wilmington, Del., a short time before her trip to Charleston on account of the charge of filibustering? A. No.

Q. Was she not seized for filibustering while you were connected with her before this trip to Charleston? A. No.

Q. Never? A. No.

THE DEFENDANT DID ACTUALLY DETAIN THE "LAURADA."

That the defendant did actually detain the steamship "Laurada" for the space of twenty-one days, conclusively appears in the record, as follows:

1. By his admission in the answer, as follows:

"That true it is that acting under the instructions from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the "Laurada" and formally *take possession* or charge of said vessel, and that *he kept her in his custody for twenty-one days*" (par. 3, the Answer, p. 4, Record).

2. It further appears that her detention was in pursuance of the instructions of the Secretary of the Treasury, as contained in the telegrams of the Secretary of the Treasury to the defendant Collector on p. 67 of the Record:

"78 A. F. C. F. 76 Paid Gov't. 4:35 P. M.
"Washington, D. C.,-Nov. 15.

"Collector Customs, Charleston, S. C.:

"Secretary State requests this Department to take such "instant and appropriate action as is necessary to vindicate the "neutrality laws in the case of the steamer 'Laurada' *supposed* "to have landed a hostile expedition from the United States "in Cuba; if the vessel arrives in your District, you will please "take measures for her *detention* and report acts to this Depart- "ment without delay, consult United States Attorney.

"C. S. HAMLIN, Actg. Secy."

"51 A. C. M. A. D. 50 Paid Gov't. 2:49 P., Nov. 16.
"Washington, D. C., 16.

"Collector Customs, Charleston, S. C.:

"Referring to telegram yesterday relative to steamer 'Lau- "rada,' Collector Customs, Philadelphia, states that he advised "by Marine Exchange that she had just arrived at your port. "Take measures as directed in yesterday's telegram for DETEN- "TION vessel and report by telegraph.

"C. S. HAMLIN, Acting Secretary."

(P. 68, Record.)

These instructions to the Collector were that he should DETAIN the vessel. That he followed these instructions appears in his own testimony:

"Q. You might tell what you did? A. This telegram instructed me to take measures for the *detention* of the 'Laurada' and to consult with the United States Attorney, who at that time was Mr. Perry Murphy. Immediately upon receipt of this telegram on the 15th November, I consulted Mr. Perry Murphy, who at that time had his office in the United States Customhouse, Court was located there, it was convenient, and I took the telegram and went to him and consulted with him, and he advised me to put an *inspector aboard the 'Laurada,'* which I did."

(Folio 33, p. 28, Record).

3. It also appears by the letters at the time of the defendant Collector to the then Senator M. C. Butler, one of the counsel of the steamship "Laurada," which are set forth at page 68 of the Record:

"Charleston Hotel, Charleston, S. C., Nov. 20, 1895.
"Hon. Geo. D. Bryan, Collector of Customs, Charleston, S. C.

"My Dear Sir: We are informed that you are *detaining* the steamer 'Laurada' on behalf of the United States.

"We are desirous that she shall *forthwith proceed* and therefore beg to inquire if she may do so now, as we do not wish to advise conflict with the instructions of the Government of the United States. We request an early reply.

"Very truly yours,

"M. C. BUTLER,
"Counsel for S. S. 'Laurada.'

"Please address me 11 Broad St., Charleston, S. C., P. O. Box 244."

"Office of the Collector of Customs,
"Port of Charleston, S. C.,
"November 20, 1895.

"Hon. M. C. Butler, Counsel for S. S. 'Laurada.'

"My Dear Sir: Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I AM DETAINING the steamer 'Laurada' on behalf of the United States.

"I could not permit her to proceed as indicated in your letter as my instructions are to *detain* her.

"Yours very truly,

"G. D. BRYAN, Collector."

(P. 68, Record.)

"Office of the Collector of Customs,
"Port of Charleston, S. C.,
"December 6, 1895.

"Hon. M. C. Butler, Counsel for S. S. 'Laurada,' Charleston, S. C.

"Sir: I beg to inform you that under instructions from the Government, I have today withdrawn my inspector from the 'Laurada,' and she is free, so far as this office is concerned.

"Yours respectfully,

"G. D. BRYAN, Collector."

P. 69, Record.)

From this correspondence at the time, it appears again, conclusively, that the defendant, the Collector, was actually detaining the steamer "Laurada," for, upon inquiry by Gen. M. C. Butler, counsel for the steamship "Laurada," on the 20th of November, saying:

"We are informed that you *are detaining* the steamer 'Laurada' on behalf of the United States;" and stating: "We are desirous that she shall *forthwith proceed*, and therefore beg to inquire if she may do so now."

The reply of the defendant Collector on the same day, 20th November, 1895, was:

"In reply, I beg to say that you are correctly informed that *I am detaining the steamer "Laurada"* on behalf of the United States."

"I could not permit her to proceed, as my instructions are to detain her" (p. 68, Record).

And this actual custody and detention by the Collector, under his instructions, continued until the 6th day of December, 1895, when, in his letter to General Butler, counsel for the "Laurada," the defendant informs him that: "Under instructions from the Government I have today withdrawn my inspector from the 'Laurada,' and she is free" (p. 69, Record).

It further appears by the plaintiff witness, Townsend, stevedore of the steamer at Charleston, that the steamer "Laurada" was moved in Charleston from the Savannah Railroad Wharf, where she was ready to take her cargo there ready for her, to the *Customhouse Wharf* (pp. 14, 15, Record). This was a further act of control and detention by the Collector.

It, therefore, conclusively appears, both by the admission in the pleading, and by the testimony of the defendant himself, and by his letters written at the time, in the replies to the letters of the steamer's counsel, Senator M. C. Butler, that the steamer was actually being detained by the Collector, with an Inspector of the Customhouse aboard, who had "taken possession of the steamer," "was in custody of the steamer and would not permit her to proceed."

THE "LAURADA" ILLEGALLY DETAINED BY COLLECTOR.

Sec. 5290 of Revised Statutes of United States is plead for justification. But when analyzed in its literal words, it is:

(1) "The several Collectors of the Customs shall detain any vessel manifestly built for warlike purposes,

(2) "and about to depart the United States;

(3) "the cargo of which principally consists of arms and munitions of war.

"WHEN

(a) "the number of men shipped on board,

(b) "or other circumstances render it probable—that such "vessel is intended to be employed by the owners to cruise or "commit hostilities upon the subjects, citizens or property of "any foreign principality or State, colony, district or people "with whom the United States are at peace, until the decision "of the President is had thereon, or until the owner give such "bond and security as is required of the owners of armed ves-"sels by the preceding section."

Under the authority of this statute for detention of a vessel by the Collector, before he can act under this statutory warrant, there must exist the facts (1) that "the vessel was man-

ifestly built for warlike purposes;" and (2) that she is "about to depart the United States;" and (3) that the cargo of which "principally consists of arms and munitions of war"—unless these facts appear, he has no statutory warrant whatever to detain the vessel. When they do appear as a basis, and other facts, i. e., of "the number of men shipped on board," or other circumstances render it probable that she is intended for a military expedition, then, and not until then, can she be detained. In this case the defendant has not said, nor has any one said, that the "Laurada" "is manifestly built for warlike purposes," that she "is about to depart the United States," and "that the cargo consisted of arms and munitions of war," and the whole basis for such action is wanting. Not only this, but there were no men shipped on board of her except her sailors.

The total lack of proof, and absence of fact which, under the warrant of law, the Collector alone could proceed, demonstrates the lack of probable cause for the action of the Collector in detaining the vessel. It is not a question of conflict of evidence, there is absolutely no facts whatsoever which, under the statute, this action of detention can be justified. It was done only on the instruction of the Treasury Department to the defendant, and the defendant must obey, even if there is no evidence or warrant of law.

The reason the defendant Collector must obey the unlawful mandate of his superior is because the United States protects him in so doing.

Sec. 989 Revised Statutes U. S. provides that: "When a recovery is had in any suit or proceeding against a Collector or other officer of the revenue for *any act done by him*, or for the recovery of any money exacted by or paid to him, and by him paid into the Treasury, in the performance of his official duty, and the Court certifies that there was probable cause for the act done by the Collector or other officer, or *that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government*, no execution shall issue against such Collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Rev. Stat. U. S., p. 185.

It will be noted that even if there was "probable cause" for the act done by the Collector, that is no justification of the Collector, as alleged in paragraph two of the answer, but the "probable cause" does not confer any legal authority, and would not bar the plaintiff's right of action, but it would only have the effect, under this statute, of having the Court to certify "that there was probable cause for his act, or that he acted under the directions of the Secretary of the Treasury or other

proper officer of the Government," and thereby he would be relieved of a personal judgment, and the amount would be paid out of the proper appropriation from the Treasury.

The statute and the cases upon this subject show the policy of the Government is not to make the private citizen bear the damage that an unlawful act of this nature causes; but even if there was "p[illegible]able cause," or a direction of the Secretary of the Treasury, or officer of the Government, which did not constitute due process of law, or was not a legal justification, the Government would pay out of its own Treasury the damage to the private citizen.

Hendricks v. *Gonzales*, 67 F. R., 351.
Conqueror, 166 U. S., 123, 124, 125.
See, also, *Cruickshank* v. *Bidwell*, 176 U. S., 81, 82.
And *DeLima* v. *Bidwell*, 182 U. S., 179.
U. S. v. *Sherman*, 98 U. S., 566, 567.

We ask particular reference to the case of *Hendricks* v. *Gonzales*, 67 Fed. Rep., 351, which was an action against a collector of the port of New York, to recover damages or the detention of a vessel, in which the Court held:

"It is no justification to a collector of customs for detaining a vessel that he acted under instructions from the Secretary of the Treasury, unless such instructions were authorized by law."

And further holding that: "It is not enough to justify a collector of customs in detaining a vessel under Revised Statutes 5290, that it is the purpose of her intended voyage to transport arms and munitions of war for the use of an insurrectionary party in a country with which the United States are at peace."

In that case the U. S. Circuit Court of Appeals affirmed the judgment for the plaintiff in a case very much stronger for defendant Collector than this case, where the Collector had detained a steamer, acting under the instructions of the Secretary of the Treasury. The facts in that case that were brought to the information of the Collector in respect to the vessel, and the purposes of her voyage were:

"That she was an ordinary merchant steamer; that her cargo consisted wholly of arms and munitions of war; that the charterer was in sympathy with the Venezuelan insurgents; that she was bound for a port near the seat of hostilities; but that she was not at that time manned, or in a state of preparation otherwise for belligerent operations. Information had also been communicated to him tending to show that the war materials on board the vessel were destined for the ultimate use of the insurgent forces" (p. 352).

The case was submitted to a jury, who found for the plaintiff. Error was assigned "because of the refusal of the trial

Judge to rule that the defendant was exonerated from liability for his acts by his instructions from the Secretary of the Treasury, and also for the refusal to instruct the jury that, if the defendant had reasonable cause to believe that the vessel was chartered and loaded for the purpose of transporting arms and munitions of war to the insurgents of Venezuela, he was justified in refusing a clearance" (p. 353).

The Appeal Court says, p. 353:

"Neither the Secretary of the Treasury nor the President could nullify the statutes, and, though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized by law. *Little* v. *Bareme*, 2 Cranch, 170; *Otis* v. *Bacon*, 7 Cranch, 589. It is provided by statutes (Rev. St. U. S., Sec. 989) that when a recovery is had in any suit against a collector or other officer of the revenue for any act done by him in the performance of his official duty, and the Court certifies that he acted under the directions of the Secretary of the Treasury, no execution shall issue, but the amount recovered shall be paid from the Treasury. It was to provide for a case like the present that this statute was enacted, and the statute would have been wholly unnecessary except that the order of a superior officer is no defense to an inferior for the unlawful performance of an official act."

"The neutrality laws of the United States (Rev. St., Sec. 5290) authorize collectors of customs to detain, until the decision of the President is had thereon, 'any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances render it probable that such vessel is intended to be employed by the owners to cruise or to commit hostilities upon the subjects, citizens or property of any foreign prince or State, or of any colony, district or people with whom the United States are at peace.' The *defendant's justification must be found under the authority of this statute, or it cannot be found at all.* That it is not found there is almost too plain for argument. The vessel was not 'manifestly built for warlike purposes,' but was an ordinary merchant steamship. If she had been built for warlike purposes, that fact alone would not have authorized her detention by the Collector, because the statute does not permit even such a vessel to be detained unless the number of men shipped on board or other circumstances render it probable that she is intended to be employed 'to cruise or commit hostilities,' or, in other words, engage in naval warfare against the subjects or property of a friendly power. It

is not an infraction of international obligation to permit an armed vessel to sail or munitions of war to be sent from a neutral country to a belligerent port, for sale as articles of commerce; and neutrals may lawfully sell at home to a belligerent purchaser, or carry themseves to the belligerents, articles which are contraband of war. It is the right of the other belligerent power to seize and capture such property in transit; but the right of the neutral State to sell and transport, and of the hostile power to seize, are conflicting rights, and neither can impute misconduct to the other. The penalty which affects contraband merchandise is not extended to the *vessel* which carries it, unless ship and cargo belong to the same owner, or the owner of the ship is privy to the contraband carriage; and ordinarily the punishment of the ship is satisfied by visiting upon her the loss of time, freight and expenses which she incurs in consequence of her complicity. On the other hand, it is the duty of every government to prevent the fitting out, arming or equipping of vessels which it has reasonable ground to believe are intended to engage in naval warfare with a power with which it is at peace. These are familiar rules of international obligation, in the light of which the particular statute is to be read. It is intended to prevent the departure from our ports of any vessel intended to carry on war, when the vessel has been specially adapted, wholly or in part, with this jurisdiction, to warlike use. There was not a particle of evidence brought to the attention of the collector tending to show that the vessel was intended to be employed in acts of war. It is not enough that it was the purpose of her intended voyage to transport arms and munitions of war for the use of the insurrectionary party in Venezuela. The Florida, 4 Ben., 452; Fed. Cas., No. 4887; The Carondelet, 37 Fed., 799; The Conserva, 38 Fed., 431; *U. S.* v. *Trumbull*, 48 Fed., 99.

"There was no error prejudicial to the defendant in the rulings of the trial Judge. Indeed, if, instead of submitting the question of probable cause to the jury, he had ruled, as matter of law, that the evidence did not make out a case of probable cause, we think he would have been justified in doing so. The judgment is affirmed."

Hendricks v. *Gonzales*, 67 Fed. Rep., 352, 353, 354.

On the facts of this case at bar admitted by the defendant Collector himself, that there was *"no evidence"* to convict the vessel, and the affirmative testimony of plaintiff's witnesses showing the unlawful detention while the "Laurada," lawfully as a merchant ship, was proceeding to take a cargo of pyrites cinders as previously, to a northern port, holds empty and no cargo on board, made a clear *case of liability* on part of defendant.

DEFENDANT'S SECOND DEFENSE THAT "LAURADA" WAS IN THE CUSTODY OF THE LAW IS NOT SUSTAINED.

That the Marshal of the United States, by his deputy, was also aboard of the "Laurada" does not relieve defendant of liability, as the Marshal was acting under a *void* warrant issued in the cause, and the Court had no jurisdiction, and was himself without any authority of law, and a trespasser equally with the defendant, the Collector of the Port.

The further defense of the defendant Collector in this case is that notwithstanding he actually did take possession of and had custody for twenty-one days of the steamer "Laurada," and did detain her under the instructions of the Treasury Department, that this caused no damage to the plaintiff, because, "the said 'Laurada,' then being in custody of the Marshal, under a libel issued out of the District Court for the District of South Carolina, at the suit of John E. Kerr & Co. against the steamship 'Laurada,' that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not released by him until the 18th day of December, A. D. 1895, and this defendant submits that any damages sustained was by reason of such detention, and did not result from the act of this defendant."

(P. 5, Record.)

In other words, the plea of the defendant is, that although he may have unlawfully detained the steamer "Laurada" for twenty-one days, some other person, to wit, the Marshal of the United States, was also detaining her during that time, and that under legal process, whereby the vessel was *in the custody of law.*

This contention, however, cannot be sustained by the facts in evidence under a proper legal understanding of the same, for although a person claiming to be a guard of the U. S. Marshal was on board at the same time that the inspector of the defendant was on board, still upon examination of the record, in the case of *John E. Kerr & Co.* v. *"Laurada,"* it appears that the Marshal and his deputies and guards were upon the vessel without authority of law under a *void* process, and the Marshal and all persons acting under him were trespassers equally with the defendant.

To sustain this second defense of the defendant, the defendant introduced in evidence the record of *John E. Kerr & Co. against The Steamship "Laurada,"* an action *in rem,* in Admiralty in District Court U. S. for South Carolina, which record is set forth on page 47 to page 60 of the Record.

The declared purpose of defendant in introducing the said record is: "For the purpose of showing the custody of the

Marshal" under the warrant of arrest in that suit (folio 25, p. 2, Record).

This record of the proceeding *in rem*, however, instead of justifying the Marshal in his custody, and instead of showing that the vessel was *in custodia legis*, shows that the Court had no jurisdiction *in rem* in this case, and the process was void.

This appears by the final decree of the Admiralty Court in that case:

"John E. Kerr & Company,
vs. "*Libel in Rem.*
S. S. "Laurada."

"This cause came on to be heard before the District Court of the United States for the District of South Carolina on the records, pleadings and proofs herein.

"Whereupon it is now ordered, adjudged and decreed that the libel herein be dismissed for want *of jurisdiction of the Court in rem in this cause, and process herein being void.*"

"WM. H. BRAWLEY, U. S. Judge."

"5 December, 1899." (P. 60, Record, fol. 70.)

So that the Admiralty record, which is introduced in evidence by the defendant, by the final decree in the cause determined, first, that the Court has no jurisdiction of the cause *in rem.*

And secondly, That the process in the cause was void.

So that it appears that the record introduced by the defendant with the purpose of proving that, during the time that the defendant was in custody and detaining the "Laurada" she was *in custodia legis* in possession of the Marshal, proves conclusively that the Admiralty Court was without jurisdiction of the action *in rem*, and that the process to the Marshal was *void*.

Under the authorities on this state of facts, and final decree, the "Laurada" would not be while in the possession of the Marshal *in custodia legis*, but on the contrary, the Marshal and those acting under him, would be trespassers, and would be private, unofficial persons, and tort feasors with the defendant in detaining the vessel.

Not only did the Admiralty Court so finally decree in the cause of John E. Kerr & Company against the S. S. "Laurada," which is conclusive upon the defendant here and upon this Court here, as being the final decree in that cause, the record of which was put in evidence by the defendant himself as a defense, but if we examine the record, put in evidence, this Court would independently find the legal effect of this record to be the same, and the possession by the Marshal to be unlawful and not to be *in custodia legis*.

THE PROCESS WAS VOID.

FIRST. THE PROCESS WAS VOID AS HELD BY THE U. S. DISTRICT COURT.

By reference to the monition and warrant of arrest, dated the 15th day of November, 1895 (on page 55 of the Record), which was the process under which the Marshal took the "Laurada" into custody on the same day (p. 55, folio 63, of the Record), it will be noticed that the Clerk's signature was signed as follows:

"E. M. SEABROOK,
"C. D. C. U. S. S. C.,
"Per JULIUS SEABROOK, Dep. Clk.
"(Seal) U. S. Dist. Court, Dist. S. C."

It will be noticed that forthwith J. P. K. Bryan, Proctor for the claimant, the S. S. "Laurada," made a motion to set aside process and warrant of arrest of the said steamship, on the ground that said process and warrant of arrest were not signed by the Clerk or Deputy Clerk of this Court (which motion does not appear in the record, but which motion is referred to in the answer to the said motion of the libellant's Proctor, filed the 6th day of December, 1895, p. 57, folio 65, of the Record), in the following words:

"Trenholm, Rhett and Miller, Proctors for libellants, replying to the motion of J. P. K. Bryan, for claimant of steamship 'Laurada,' to set aside process and warrant of arrest of said steamship on the ground that said process and warrant of arrest were not signed by the Clerk or Deputy Clerk of this Court, deny the ground set forth for said motion, and on the contrary, allege that said process and warrant of arrest were duly signed and sealed by a Deputy Clerk of this Court.

"TRENHOLM, RHETT AND MILLER,
"WING, PUTNAM AND BURLINGHAM,
"Proctors Libellants.

"Dec. 6, 1895, Charleston, S. C."

This motion was decided by the Admiralty Court, as we have seen, "that the process herein was void" (p. 60, folio 70, Record).

Independently, however, it appears by the evidence at the trial of the cause in the U. S. Circuit Court that this process of arrest and monition (p. 54), was void by the testimony of Julius Seabrook, the Deputy Clerk, contained on pages 34 and 36, which is as follows:

"JULIUS SEABROOK, sworn:

By Mr. Bryan:

Q. (Handing the witness the monition in the case of *John*

E. Kerr & Company v. *The Steamer "Lauruda,"* dated 15th November, 1895): Will you look at the writing at the bottom of that monition "E. M. Seabrook, C. D. C., U. S., S. C., per Julius Seabrook, Deputy Clerk," will you say in whose handwriting that is? A. That is in the handwriting of my brother, J. D. Seabrook.

Q. Whose handwriting is it? A. I recognize it as the handwriting of J. D. Seabrook, my brother.

Q. At that time where was Mr. E. M. Seabrook, Clerk of the United States District Court, on the 15th November, 1895? A. He was out of the District, in Atlanta, Ga.

Q. What was his condition? A. He was sick at the time.

Q. How soon after that did he die? A. About within the next ten days.

Q. Where were you, Julius Seabrook, Deputy Clerk, where were you on the 15th November, 1895? A. I was not in Charleston, and my recollection is that I was in Atlanta.

Q. With your sick father? A. Yes, sir.

Q. What was your brother's occupation at that time? A. As I remember he had been engaged in rock-mining shortly previous to that time, and as I remember it he was still engaged in rock-mining at that time.

Q. How did he come to go into the office at that time? A. I was called off in the emergency of my father's sickness, and expected to be absent.

Mr. Cochran: We object to all of this testimony on the ground that this record cannot now in a suit between other parties be attacked collaterally in that way; it is regular on its face.

Mr. Bryan: Q. During this emergency you asked him to go in and look after the office for you? A. I asked him to take charge of the office for a few days during my absence, and to file any papers that came in.

Cross-Examination.

Q. He had authority to sign your name for you? You told him to sign your name? A. I told him to mark any papers filed, that is my recollection. I told him to receive and mark "filed" any papers that came in, and if it was necessary to issue any writs, subpœnas or writs, to sign the Clerk's name to them.

Q. You told him that? A. I told him that; there was very little going on at the time, it was in the fall, and *I counted on nothing turning up* during my absence; I would not be absent more than a few days.

Q. Your brother was not a deputy? A. I was *the Deputy Clerk* of the office, and had been deputy for some years previously. * * *

The warrant of arrest of the "Laurada" was issued, therefore, when both the Clerk and his Deputy Clerk were out of the District of South Carolina, and it was issued, signed and sealed by a private unofficial person, who had no power to do an official act; and could not be delegated by the Clerk or Deputy Clerk in his absence to act for him, for the power to appoint a Clerk or Deputy is lodged only with the Court itself by Statute, and the express provision of the law is the writ shall be *signed* by the Clerk (or Deputy).

Section 555 of the Revised Statutes of the United States, p. 93, provides that "A Clerk shall be appointed for each District Court by the Judge thereof, except in cases otherwise provided for by law."

Section 558 provides that: "A Deputy may be appointed by the Court on the application of the Clerk."

Rev. Stat., U. S., p. 94.

Section 911 provides that: "All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, *and shall be signed by the Clerk thereof.*"

Rev. Stat. U. S., p. 174.

OPINION OF CIRCUIT COURT OF APPEALS.

It was on this record and evidence that the United States Circuit Court of Appeals thus states and decides the question involved:

"The Collector of the Port of Charleston, as has been stated, sent his inspector aboard the 'Laurada' the day after the Marshal took her in custody, and the possession of the two was simultaneous from that time until the vessel was released by the Collector. Thus the sole question is whether the possession of the Marshal first obtained protects the Collector in this action which is brought against him by the owner of the ship to recover damages for an alleged trespass. The principles of law in regard to actions of trespass are well settled and the rule is the same, both as to realty and personal property. The person who undertakes to maintain his action must, at the time when the act which constitutes the alleged trespass is committed, either have the actual possession in him of the thing which is the subject of the trespass, or must have a constructive possession in respect to the thing being actually invested in him, with the right to immediate possession. This latter doctrine is well declared in *Wilson* v. *Haley Live Stock Company*, 153 U. S., 39, in which the Court holds: 'A court in trespass *de bonis asportatis*, for the taking and detaining of personal property, can only be supported on the theory that the plaintiff was either its owner or entitled of right to its possession at the time of the

trespass complained of.' In the final disposition of this case by the trial Court, no question was made as to the ownership of this vessel by the testator of the present plaintiff, nor is there any presented in the arguments or briefs submitted to this Court. Then the original plaintiff being the owner, did he at the time have the possession of his vessel, or did he have the right to immediate possession by reason of the wrongful custody of the Marshal? In other words, was the Marshal there as a trespasser? In disposing of the libel case, as is shown by the decree, which is incorporated above, the Court declared that the process therein was void. Counsel for the defendant makes the point that this decree was by consent and was *inter alois acta*, and that it, therefore, can have no effect upon the present case. So far as the rights of the parties to that particular action are concerned, we admit this position to be true, but this decree is not relied upon in that view here. It is only in support of the position that the process under which the Marshal took custody of the vessel was void and, therefore, conferred no authority upon him to take possession of the ship. However, aside from this decree, the facts being admitted as to the circumstances under which the monition and attachment was issued, this Court, we think, has the right to determine as to whether or not it was a void process, and in our opinion it was. The person who signed the name of the Clerk and the Deputy Clerk and affixed the seal of the District Court of South Carolina to the process, had no authority whatever to do these acts. He was not even an officer *de facto*, and in our view the process which the Marshal had and under which he took custody of this vessel had no more legal force and conferred no more legal authority than if it had been issued from the office of the proctors, without the intervention of the person who signed it and affixed the seal to it. With this conclusion, it necessarily follows that the custody of the Marshal was wrongful. He was aboard the ship, holding it in custody unlawfully. He was a trespasser. The wrongful possession of property by a trespasser does not oust the possession of the rightful owner so as to divest the latter of his right to maintain an action against the subsequent unlawful entry of another than the original wrongdoer. In the case of *Van Brunt* v. *Shenck*, 11 Johns (N. Y.), 377, it was held that, 'where A's vessel is seized by B under the United States internal revenue laws, and C, with the consent of B, makes use of the vessel, A cannot maintain trespass, because B's possession was lawful and A was, therefore, not in possession at the time of C's trespass.' This is undoubtedly the law, and if the possession of the 'Laurada' by the United States Marshal, at the time the Collector took possession had been lawful, we would not hesitate to concur with

the trial Judge in his ruling that the action of trespass against the Collector could not be maintained. But, as we have stated above, the possession of the Marshal was not lawful, and, therefore, the right of property and the immediate right of possession was in the owner. And if the Collector took possession unlawfully or wrongfully, the owner can maintain his action against him, and it was error, in our opinion, for the trial Court to hold that the possession of the Marshal, under the circumstances, protected the Collector and deprived the owner of the vessel of this right. We do not intend by this opinion to deprive the defendant of any right to contest the real ownership of the vessel or to set up by way of defense the *bona fides* of his action in seizing the vessel, the probable cause which may have existed at the time, of any other legal defense. We only decide that the possession of the Marshal does not shield the defendant, nor was it a legal ground upon which to direct a verdict against the plaintiff.

"The judgment of the District Court of South Carolina is reversed and the case is remanded for further proceedings in accordance with the views expressed in this opinion.

Record, pp. 84-86.

The defendant Collector, the petitioner here, attacks this legal position of the Circuit Court of Appeals.

Authorities Cited by Petitioner.

The authorities cited by the petitioner in his petition do not sustain his contention. In all of these cases the warrant was issued by an *officer* having *power and jurisdiction to issue the warrant*, and the process was fair on its face, and in these cases the Court held that any defect, such as the nature of the affidavit preceding the attachment, or any error of judgment on the part of the officer having authority to issue the warrant, did not affect the officer serving the warrant, and it was voidable only. The petitioner has not cited any cases like the case at bar where the person issuing the warrant is not an officer having lawful authority to issue the warrant, but a private, unofficial person, and not the clerk, or the deputy clerk. In such cases, the Courts have always held, because of the *want of power* in the person issuing the warrant, the warrant was void. In the same way this Court has held that if the Court had jurisdiction, its judgments, however erroneous, are only voidable. But if the Court had no jurisdiction, its judgment and execution founded thereon are void.

The following are the cases cited by the petitioner:

In *Matthews v. Densmore,* 109 *U. S., p.* 216, the writ of attachment was issued by an officer, the clerk of the Court, and in that case it was attacked because of mistakes in the affidavit, that is, in the preliminary acts which preceded its issue, but the power of the clerk to issue the attachment was not questioned. This Court say:

"It would seem that the mandatory process of a court of general jurisdiction, with *authority to issue* such a process, and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the Court and are within its jurisdiction, cannot be absolutely void *by reason of errors or mistakes in the preliminary acts which precede its issue.*" (P. 219.)

Again, in *Matthews v. Densmore,* the Court quoted with approval further from *Cooper v. Reynolds,* 10 *Wall,* 308, as follows:

"The precise point as to the validity of this writ of attachment was under consideration in this Court in the case of *Cooper v. Reynolds,* 10 *Wall,* 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been often quoted since, and is conclusive in the Federal Courts in regard to the validity of their own process when collaterally assailed, as in the present case.

"The Court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits *in rem* and *in personam,* in answer to the question: On what does the jurisdiction of the Court in that class of cases depend? answers it thus:

"It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem.* Without this the Court can proceed no further; with it the Court can proceed to subject that property to the demand of plaintiff. *If the writ of attachment is the lawful writ of the Court,* issued in proper form, under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into Court the power of the Court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly *the officer whose duty it is to issue the writ* may have failed in some manner to observe all the requisite formalities,

but the writ being issued and levied, the affidavit has served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the Court of the jurisdiction acquired by the writ levied upon defendant's property."

It will be noted that the precise question was thus decided by the Court, that is, before the Court could get jurisdiction *in rem*, or before the officer could be protected, the writ must not only be issued in proper form and appear regular, but it must be *"the lawful writ of the Court,"* that is, issued by the officer having authority of the law to issue it.

"If the officer whose duty it was to issue the writ" did not issue the writ, but it was issued by some third person, a private, unofficial person, then it is not the *"lawful writ of the Court,"* it is void and jurisdiction fails. If the officer whose duty it was to issue the writ, did actually issue the writ, although he failed in some manner to observe all the requisite formalities, and although he may have erred in his judgment, this would be a lawful writ of the Court, not void, but only voidable.

In *Connor v. Long*, 104 *U. S.*, 228, the fact was that the warrant of attachment was duly issued to the sheriff, who sold the perishable goods, and paid the same to the plaintiff's attorney; no question was made that the officer who issued the writ of attachment had no power to issue the same. It was upon these admitted facts that this Court held that the sheriff was not liable for proceeding under it, and could not be sued for the amount of the proceeds of sale paid to the plaintiff's attorney.

The rule for which we contend, as stated in that case, is as follows:

"The rule of duty and of liability is thus stated with admirable force by Hosmer, C. J., in Watson v. Watson (Conn. 140, 146): 'Obedience to all precepts committed to him to be served is the first, second, and third part of his duty; and hence, *if they issue from competent authority* and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command.'" (Pp. 237-238.)

The same principle was decided by this Court in the case of Buck v. Colbath, 3 Wall, 334;

"It follows from this, as a rule of law of universal application, that if the Court issuing the process had jurisdiction

in the case before it to issue that process, *and it was a valid process when placed in the officer's hands*" * * * "then such process is a complete protection to him." (P. 343.)

It is necessary, therefore, that the process must be valid when placed in the officer's hands.

In the case of *Marks v. Shoup*, 181 *U. S., p.* 562, the question was made that the attachment was void, because of a defect in the affidavit. This Court, however, decided, as it had already decided in *Matthews* v. *Densmore*, 109 *U. S., p.* 216, that such a defect did not render the warrant void, but only voidable, on the evident fact that the *authority of the clerk issuing the warrant* had not been attacked, and inasmuch as the clerk, the officer charged with the duty of issuing the warrant, had the power, that is, the jurisdiction to issue the warrant, and had officially acted in issuing the warrant, his official action, however erroneous or irregular it may have been, did not make the warrant void, but only voidable.

These are the decisions of this Court, cited by the defendant petitioner to the effect that the Admiralty warrant of arrest of the "*Laurada*" in this case, issued by a private, unofficial person, the brother of the deputy clerk, in the absence of both the clerk and deputy clerk from the District of South Carolina, is a lawful writ of the Court and protects the marshal, and puts the vessel in *custodia legis*. We submit that these authorities are to contrary. The other cases cited by petitioner are from the State Courts, and if examined will show that they are to same effect. They are as follows:

In *Donahue v. Shed*, 8 *Met.* 326 (cited by petitioner).

"An action of trespass will not lie against an officer for serving a warrant issued in legal form by a court having jurisdiction, and directing him to arrest the party, even though the proceedings of the Court in issuing the warrant may have been erroneous." (Rubric.)

In that case the warrant was "signed by the Justice." (See warrant, p. 327 Id.), and the Court had jurisdiction of the offense. (P. 328.) Id.

In *Rex v. Danser*, 6 T. R. 242 (cited by petitioner), the sole question was whether the Court had jurisdiction.

In *Millings v. Russell*, 23 *Pa. St.* 189 (cited by petitioner).

In this case again it was trespass against an officer who acted under an execution. The facts as stated by the Court were: "It (the execution) was issued by *a justice* of the peace

upon a judgment in attachment under the Act of 1842. The affidavit was irregular and so was the bond."

The Court say: "It is a rule to which there is no exception that when a judgment is given by a Court or Judge having *jurisdiction* of the subject-matter, its regularity cannot be inquired into in a collateral proceeding." If the *justice* was wrong in issuing his attachment * * * the defendant could get redress only by *certiorari*. A ministerial officer may not be sued as a trespasser for simply obeying the command of the writ, regular on its face."

The execution was issued by the justice having power to issue it, though he may have acted erroneously.

In *Putnam* v. *Mann*, 3 *Wendell*, 202 (cited by petitioner), the constable was sued for levying execution. Here again the fact, as stated by the Court, was "The execution on which Putnam was arrested was issued *by the justice*" (pp. 202, 203) whom the Court declared to have jurisdiction, that is, power to issue the execution; the only question raised was whether the justice acted wrongly (p. 205). The Court announced the usual rule:

In *Earle* v. *Camp & Stone*, 16 *Wendell*, 562 (cited by petitioner).

The facts were in that case: "The attachment was issued by a *justice* of the peace" (p. 563).

The Court say: "A ministerial officer is protected in the execution of process issued by a court or *officer having jurisdiction* of the subject-matter, and of the process.

In *Deyo v. Valkenburg*, 5 *Hill*, 242 (cited by petitioner).

The action (trespass) was not against an officer, but against attorney and his client for issuing *ca. sa.*, and in that case also the judgment and execution was issued by the clerk, a person having power to issue it.

Wilton Mfg. Co. v. Butler, 34 *Maine*, 421 (cited by petitioner).

In that case the officer was sued after serving an execution issued in a judgment of the Court alleged to be obtained by fraud. The officer issuing the execution had power to issue it. The Court say:

"An officer may be protected in the service of an execution, although there was such *irregularity* in the writ and in the service of it, as would, if pleaded, have abated the suit, etc." (Rubric, 431. See also p. 440.)

The Court said the officer was not accountable for any error in the judicial proceedings of the Court which awarded it.

Bogert v. Phelps, 14 *Wis.*, 89 (cited by petitioner).

In that case the "warrant of attachment was issued to the defendant as sheriff by the *County Judge of Dodge County*," reciting it had been made satisfactory to appear to him that defendant had been guilty of fraud in contracting the debt.

The Court say:

"It is not pretended that the warrant of attachment was bad on its face; nor that the *County Judge of Dodge County had not the power to issue it*. These two things being conceded, it operated as a complete protection to the officer for all acts which he might lawfully do by virtue of it. It matters not how irregularly the County Judge may have exercised the jurisdiction conferred upon him by law, or how far he may have departed from the direction of the statute."

Id., p. 92.

This case again was decided upon the principle that the County Judge *had the power;* had the jurisdiction, to issue the warrant, and this protected the sheriff.

In the case at bar, however, the clerk of the United States District Court, or his deputy clerk, alone had the power to issue the arrest warrant, and neither acted, but a private, unofficial person, in their absence, issued the warrant.

In *Nichols v. Smith*, 26 *N. H.*, 298 (cited by petitioner).

In this case the general practice in the county was for attorneys to sign writs for the justice in *civil* actions, on such a writ defendant *personally appeared* and pleaded general issue, and after trial judgment was rendered; no exception to writ until after judgment had been rendered. The Court held the defedant had waived the defect by pleading, and said:

"But objection to the jurisdiction, which relates merely to the *persons* of the parties, to the proceedings by which they are brought into Court, in general, only renders the proceedings voidable. The general principle is they may waive a right "which the law has provided for his particular benefit" (citing cases), and it has been holden that a party may waive any exception which he might take because of any failure to comply with the law directing the mode by which parties are to be made *defendants* in legal *proceedings*."

This, however, is not the law as to warrants seizing the person and property of the defendants.

The Court in that case further held:

"This Court has decided that writs signed by any other person than the justice himself, or by some person in his presence and by his direction, are invalid." *Kidder v. Prescott* (16 N. H.), 4 *Foster*, Rep. 263, and a "justice cannot confer upon anyone authority to sign writs or other process with his name in his absence, so as to make the process valid." (Pp. 301, 302.)

A fortiori in an action *in rem*, or against the person, a private person (the clerk being absent), has no right to issue a warrant to seize the property or person—it is a nullity—because not the act of the law.

In *Redmond v. Mullinax*, 113 *N. C.*, 505, 511 (cited by petitioner), the Court held a "summons" under the Code in a personal civil action, when issued by, but not signed by the clerk, but containing his name as printed in the body of the paper, and *the defendant has entered an appearance*, the Court may amend by allowing clerk to sign his name.

But the Court also held:

"We cannot extend the discretion of the Court so as possibly to include a case where counsel obtains from the clerk a form of summons, fills the blanks in the body of it and after procuring the signatures of sureties, on the undertaking, endorsed them, places it in the hands of the sheriff without giving to *the clerk*, the opportunity to pass upon the sufficiency of the security for costs, as the statute (the Code, Sec. 211) requires of him to do. The issuance of the summons in such a case is the act of the attorney, not of the clerk, and the paper is void as process, and incurable by amendment." Sheppard v. Love, 2 Dev. (N. C.) 148.

In the last case (which was writ of arrest of persons), the Court held that "a writ signed by an attorney under a verbal deputation of the clerk to all members of the bar, is a nullity."

And the Court say:

"Had the sheriff attempted to exercise power under the paper and was in the act of making the arrest, when the authority was denied and force met force and death ensued, could the grade of homicide be affected by the subsequent assent or refusal of the clerk to confirm the act?"

Ambler v. Leach 15 *W. Va.*, 677 (cited by petitioner).

The facts were that the writ was issued by the clerk in a personal action on debt, with a teste "witness, W. H. Hatches, clerk" of our said Court, but not signed by clerk, and personally served and judgment thereon and *fi fa* issued, after-

wards on sale of lands thereunder, the writ was questioned for the first time" (pp. 678, 679).

The defendant did not plead abatement and the Court held writ not void, but voidable only. The question was solely, did the proceeding make the defendants parties to the suit? The principle upon which the Court decided the cause, being a personal action, is stated on page 684.

"These proceedings 'are not necessarily nullities, or void absolutely and incurably, because all the authorities all agree that they may be confirmed. And they are confirmed by the defendant appearing in the case, and submitting his case to the judgment of the Court, or by pleading in bar to the action. If *not confirmed by the defendant*, they are void *in the broadest sense of the word, and are mere nullities.*" (See Harris v. Hardman, 14 How. 334, and cases cited.)

Idem. 684.

All these cases, cited by the petitioner from the State Courts, but confirm the principle decided in the cases cited by petitioner from this Court, i. e., that the warrant protects the officer when issued by a person having authority of law to issue it, but if such person or Court, having the authority, the jurisdiction, i. e., the legal power to act, acted erroneously, the writ is not void, but voidable. But where there is no jurisdiction or power to issue the warrant in the person issuing it, the writ is void and no protection.

RESPONDENT'S AUTHORITIES.

The decided cases all sustain the judgment of the United States Circuit Court of Appeals.

The petitioner has in his argument for *certiorari* confused void and voidable process. Void process is that which is issued without any authority of law. Voidable process is issued by authority of law, but some defect or irregularity exists in some preliminary step or formal particular. The petitioner, as we have shown, cites only cases of voidable process; but if we further examine the statutes of United States and the decisions of the Courts, other than those above cited, this warrant of arrest of S. S. "Laurada" was issued without any authority of law, and void. The Fourth Amendment of the Constitution of the United States guards "The right of the people to be secure in their persons, houses, papers and *effects* against unreasonable searches and seizures, shall not be violated."

And the Fifth Amendment guarantees "due process of law" as a protection of property.

In construing these amendments in *Boyd v. U. S.*, 116 *U. S., p.* 627, this Court quotes from the judgment of Lord Camden, which it declares to be one of the permanent monuments of the British Constitution, and foundation of our American system, as follows:

It was on the question of illegal warrant, and Lord Camden says:

"The great end for which men entered into society was to secure their *property*. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some *positive law* has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass."

Boyd v. U. S., 116 U. S., p. 627.

"Section 555 of the Revised Statutes of the United States, p. 93, provides that "A clerk shall be appointed for each District Court by the Judge thereof, except in cases otherwise provided for by law."

"Section 558 of the Revised Statutes, U. S., provides that "A deputy may be appointed by the Court on the application of the clerk."

Section 911 of Revised Statutes provides that "All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, *and shall be signed by the clerk thereof.*"

In Benedict's Admiralty, page 231, the official nature of the issuance of process is stated as follows:

"The issuing of the process being the *act of the clerk*, the party or his proctor is not responsible for its imperfections." (Page 231.)

If the issuing of process is the "act of the clerk," then the clerk *not* issuing the process, and *not* having signed or sealed the same, there is no legal process. There is no legal writ, the Court has not acted.

This Court holds the warrant is void, unless signed by the officer having the power to issue it, declaring as follows:

"Hawkins, P. C., bk. 2, c. 13 § 21, follows Lord Hale in stating the necessity of the seal to a warrant of a justice of the peace, but what Lord Hale says is this (I Hale, P. C., 577): 'It must be under seal, though some have thought it *sufficient to be in writing, subscribed by the justice;*' and he refers to Dalton's Justice, wherein it is laid down that their warrant or precept in writing should be under the hand and seal, or *under their hand at least. First Ed.* 1680, 287."

Starr v. United States, 153 *U. S.* 617, 618.

"Blackstone states that the 'Warrant ought to be under the hand and seal of the justice' (4 Bl. Con. 290), but Chitty's note on that passage is that 'it seems sufficient *if it be in writing and signed by him*, unless a seal is expressly required by a particular act of Parliament,' citing Willes, 411; Buller, N. P. 83. And this is repeated in 1 Chitty, Crim. Law, 38."

Idem. p. 618.

See also State v. Vaughn, Harper (S. C.) 313; Davis v. Sanders, 40 S. C. 507.

In the *Confiscation Cases*, 20 *Wall*, 93, 111, this Court stated the statutory requisition as follows:

"Another objection urged against the proceedings in the District Court is, that the warrant, citation, and monition was not *signed by the clerk* of the Court. It was attested by the Judge, sealed with the seal of the Court, and signed by the deputy clerk. This was sufficient. An Act of Congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do."

In that case, the signature of the deputy clerk sufficed; but here there was no official act by any officer giving this paper to the marshal. Neither the clerk or his deputy signed, or issued it.

In *Leas & McVitty*, 132 *Fed. Rep.*, 511, the Court say:

"In Middleton Paper Co. v. Rock River Paper Co. (C. C.), 19 Fed. 252, the State statute of Winconsin provided for garnishee process to be issued by plaintiff's attorney. It was held that in the Federal Court of that State this paper must be issued by the clerk of the Court, under his hand and the seal of the Court." (P. 511.)

"I think 911, Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than when a writ or process issues from a Federal Court it *must be signed by the clerk*, and shall be authenticated in the manner therein set out." (P. 512.)

(Circuit Court of W. Va., Judge McDowell.)

In the case of *Middleton Paper Company v. The Rock River Paper Co.*, 19 *Fed. Rep.*, 252, the Court held as follows:

"All writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, and shall be signed by the clerk thereof."

"A process which has been issued by the attorney, when it should have been issued by the clerk, is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons, the Court gets no *jurisdiction* of the case, and there is nothing to amend."

The Court say:

"The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into Court and answer, litigate his rights, and submit to the personal judgment of the Court, must be 'Process within the meaning of the law of Congress,' and the rule of the Court * * * And this makes the practice in this Court consistent and uniform, by which the action is begun, to be issued from the Court and allow the garnishee summons to be issued by the attorney. It is no doubt the policy of the law to keep process under the immediate supervision and control of the Court."

"If the clerk had issued the summons and failed to seal it, the Court could order it sealed. But no process, regular or irregular, has been issued by the *proper authority*. Hence it is that the Court gets no jurisdiction of the case, and there is nothing to amend by."

(Pp. 253, 254.)

"A writ signed by an attorney under a verbal authority of the clerk is a nullity."

"Where a writ is signed by an attorney under a verbal authority of the clerk, its subsequent ratification by him will not render it valid."

Gardner v. Lane, 14 *N. C.*, *p.* 53.

In *Covell v. Heyman*, 111 *U. S.*, 176, the Supreme Court quotes again the above passage, to wit:

"To give jurisdiction to the District Court in a proceeding *in rem*, there must be a *valid* seizure, and an actual control of the *res* under the process." (P. 177.)

In the case of the *Resolute*, 168 *U. S.*, 437, the Court say:

"In order for the Court to have jurisdiction, there must be a maritime contract and that the property proceeded against is within the *lawful custody* of the Court."

This Court has declared an attachment without authority of law is void.

No "attachment can issue from a Circuit Court of the United States in an action against a national bank before final judgment in the cause; and if such an attachment is made on mesne process, and is then dissolved by means of a bond with sureties conditioned to pay to plaintiff the judgment which he may recover, given in accordance with provisions of the law of the State in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff."

Pacific Nat. Bank v. Mixter, 124 *U. S.*, *p.* 721.

"We are, therefore, of opinion that the attachments in all the suits were illegal and *void because issued without any authority of law.*"

Idem. p. 728.

"In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal, and, therefore, a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment * * * such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment is illegal, and, therefore, void, so, also, must be the bond which takes its place."

Idem. pp. 728, 729.

"A warrant of arrest for seaman's wages, issued by the clerk in the absence of the Judge, contrary to the provision of a rule of Court, is *void*."

The Berkeley, 58 Fed. Rep., p. 920 (Rubric). Simonton, J.

"I am of the opinion that the original process in this case was void, and so continued notwithstanding *the stipulation;* that, as all the subsequent proceedings depended on *this* process, they were *coram non judice*."

Idem. p. 923.

Finally this Court has clearly stated the principle that governs here, as follows:

"Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals *or officers invested by law with authority* to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that *if the officer* or tribunal *possesses jurisdiction* over the subject-matter upon which judgment is passed, *with power to issue* an order or *process* for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the *officer* or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

Erskine v. Hohnbach, 14 Wall., p. 616, 617.
Stutsman Co. v. Wallace, 142 U. S., 309.

But this Court has never held that if a private person (not an officer) having no jurisdiction or power to issue process, should issue process, that there would be any protection in that case, for it is utterly void. This last case was cited and applied in the United States Circuit Court of Pennsylvania, where after quoting the language of Kent, to wit:

"They are only responsible as trespassers when they act under the *authority of a person who had no jurisdiction in the case.*"

Phil. R. R. Co. v. Kenney, U. S. C. Ct., 19 Fed. Cas. 484.

The Court say:

"The same rule is settled as the law of Pennsylvania by the repeated decision of its Supreme Court." Moore v. Alleghany City, 6 Har. (18 Pa.) 55; Cunningham v. Mitchell, 67 Pa. St. 81. In the last of these cases, Mr. Justice Agnew says: "In the case of public officers an inferior acting within the scope of his warrant, when apparently regular, is always protected, *unless the authority issuing it was without jurisdiction*," i. e., without lawful power to issue the warrant, as was the deputy clerk's brother, a private person, in the case at bar.

Idem. p. 485.

See, also,

Jacobs v. *Measines*, 79 Mass., 74 (13 Gray).

The conclusion of the whole matter under all the authorities is:

If the officer had power to issue the writ, there would be protection, but if the officer had no power to issue the writ, there would be no protection. Where there is a want of power, there is no protection. If there is power, in the person issuing the writ, to issue the writ, and there is a defect or irregularity, the writ is voidable. If there is no power, as here, where a private, unofficial person attempted to do an official act, the writ is void, and there is no protection.

This Court long ago settled the principle and policy of the law involved in this case, making it depend solely upon the jurisdiction of the Court pronouncing the decree, or upon the power of the person or officer issuing the process.

The Court say:

"Such is the law in either case, in respect to the Court, which acts without having *jurisdiction* over the subject-matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case *coram non judice.*" (Cole's case, John W., 171; *Dawson* v. *Gill*, 1 East, 64; *Smith* v. *Beucher*, Hardin, 71; *Martin* v. *Marshall*, Hob., 68; *Weaver* v. *Clifford*, 2 Bul., 64; 2 Wils., 385.) In both cases, the law is, that an officer executing the process of a Court which has acted *without jurisdiction over the sub-*

ject-matter, becomes a *trespasser,* it being better for the peace of society, and its interests of every kind, that the *responsibility of determining whether the Court has or has not jurisdiction should be upon the officer,* than that a void writ should be executed. This Court, so far back as the year 1806, said, in the case of Wise and Withers, 3 Cr., 331, p. 337, of that case: "It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly *without its jurisdiction, cannot protect the officer who executes it. The Court and the officer are all trespassers.*" (2 Brown, 124; 10 Cr., 69; Marks Rep., 118; 8 Term R., 424; 4 Mass. R., 234.

Dynes v. Hoover, 20 How., 80, 81.

"In such cases, everything which may be done is void—not voidable, but void; and civil Courts have never failed, upon proper suit, to give a party redress who has been injured by a void process or void judgment."

Idem. 81.

Party Injured Can Sue Any or All Wrongdoers—Trespassers.

This is the rule announced by the Supreme Court of the United States:

"Different modifications of the rule also arise where the controversy grows out of the tortious acts of the defendants. Where a trespass is committed by several persons, *the party injured may sue any or all of the wrongdoers,* but he can have but one satisfaction for the same injury, any more than in an action of assumpsit or a breach of contract.

"Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrongdoers jointly, or *he may sue them all or any one of them separately;* but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or, if he sues any one of them separately, and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy.

"Where the injury is tortious, the remedy may be joint or several; but the rule in this country is that a judgment against

one without satisfaction is no bar to an action against any one of the other wrongdoers. *Lovejoy v. Murray*, 3 Wall., 1; S. C., 2 Cliff., 196; *Livingston v. Bishop*, 1 Johns (N. Y.), 290; *Drake v. Mitchell*, 3 East, 258."

Sessions v. Johnson, 95 U. S., pp. 348, 349.

It is clear that the defendant, the collector, was a wrongdoer and trespasser, together with the United States Marshal and those acting under him; and the defendant is not relieved of liability by the wrong of his co-trespasser and wrongdoer—the marshal.

Again, and in conclusion, the marshal did not receive this warrant of arrest from the clerk or the deputy clerk, the only officials who could legally act and issue it to him, they both then being out of the district and the jurisdiction of the Court. The signature on the warrant, moreover, was not that of the clerk or the deputy clerk, and the marshal had, therefore, notice that, in this vital particular, it was not regular on its face, even if this notice be necessary. He was charged by law with notice that the clerk and the deputy clerk were the only officials that could legally issue and sign the warrant, and also charged by law with notice that they could not in their absence delegate their official statutory power; in the same way that the Judge himself, in his absence could not ask his brother, a private person, to act for him as Judge, and that an order not signed by the Judge, but by his brother for and in the absence of the Judge, was no authority of law.

This Court in *Whitside v. United States*, 93 *U. S.*, 257, say:

"Individuals as well as Courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act." (And cases cited.)

In every aspect, therefore, there is no custody of law by the marshal of the "Laurada" under the void warrant.

The United States Circuit Court of Appeals of the Fourth Circuit was, therefore, not in error in declaring the warrant of arrest a void warrant, and that the possession of the "Laurada" under it by the marshal was unlawful, and could not be invoked by the defendant Collector (petitioner here) to relieve him from justifying his own admitted possession and detention of the steamship, for twenty-one days, and to discharge his liability for damages as alleged in the complaint.

We pray an affirmance of the judgment of the United States Circuit Court of Appeals.

J. P. K. BRYAN,
Counsel for Roxana S. Kerr, Respondent.
(Plaintiff below.)

January, 1911.

Supreme Court of the United States.

OCTOBER TERM 1911.

No. 3.

GEO. D. BRYAN, Collector of the Port of Charleston,
PETITIONER.

vs.

ROXANA S. KER, Executrix of W. W. KER, Deceased.
RESPONDENT.

REPLY BRIEF OF RESPONDENT

J. P. K. BRYAN,
Counsel for Respondent, Roxana S. Ker,
Executrix.

REPLY BRIEF OF RESPONDENT.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 3.

GEORGE D. BRYAN, Collector of the Port of Charleston,
Petitioner,

vs.

ROXANA S. KER, Executrix of W. W. KER, Deceased,
Respondent.

J. P. K. BRYAN, Counsel for Respondent, Roxana S. Ker, Executrix.

This reply brief by the respondents is filed with the permission of the Court granted at the hearing: the brief for the Government not having been filed within six days before the hearing of the case, and in fact filed only the evening before the hearing of the cause in this Court.

I.

The contention of the United States in its first ground, page ten of its brief, that it was the duty of the marshal to serve this process because it was fair on its face, is not sustained by the authorities cited.

The citation from *Matthews v. Densmore,* 119 U. S., 216-219, that the officer is bound to obey "the process with the "seal of the Court and everything else on its face to give it "validity," was said in a case where the writ of attachment had everything on its face to give it validity, that is, it had the signature of the clerk himself, who actually issued it and it was in legal form, and the defect alleged in the case being a defective affidavit, which preceded the issuance of the writ of attachment by the clerk, and the Court held that the clerk having authority to issue the writ of attachment and actually issuing it and signing it, the process was not void but only voidable for error preceding its issue.

In *Matthews v. Densmore,* and in all of the cases cited by the respondent's main brief, this Court has clearly held that if the officer or person issuing the attachment had no authority in law to issue the process it is void, and no protection to the officer executing it.

Such is the effect of all the cases and more particularly of *Erskine vs. Hohnbach,* 14 Wallace, 613, cited by the Government and also cited by the respondent at page 37 of the respondent's main brief, wherein it appears "if the officer issu- "ing the writ has no *jurisdiction* the process is void."

The reference to Throup on Public Offices, Section 756-762 also (p. 11, Pet's Brief) upon examination, states the same principle. In Section 756 the language is "Issued by compe- "tent authority" as the test of a valid writ.

In Meechum on Public Offices, Section 690-745, 678-772, cited by petitioner (p. 11, of his Brief), again the same language is used, as a test which protects the officer, for example: "A warrant must be from the proper officer." Section 690.

"The officer must serve an irregular or voidable but not a "*void* process."

Section 768, "to be fair on its face, the authority must be "in the officer to issue the process."

In Cooley on Torts, 2d Edition, pages 538-540, the language is "process fair on its face proceeds from an officer "*having authority at law* to issue process of that nature and "which is legal in form." Sec. 538.

Again in Section 546, in Cooley on Torts, the language is "If *they issue from competent authority* and with legal regu- "larity and so appear on their face" the officer is protected.

Nowhere is there any decided case that if the warrant does not issue from competent authority it protects the officer. The jurisdiction of the officer, that is the authority, the power of the officer to issue the process is essential to its validity and if wanting it is void and the officer is not protected.

In *Buck vs. Colbath,* 3d Wallace, cited by the petitioner, (page 13, his Brief), the Court say "it is a rule of universal "application that if the Court issuing the process had jurisdic- "tion in the case to issue that process and it *was a valid pro- "cess when placed in the hands* of the officer" then it was a protection. It is *"such writs"* he must execute. (p. 343.)

In the case of *Connor and Long,* 104 U. S., cited by the petitioner, (p. 13, his Brief), the language is on page 238 "hence if they *issue from competent authority* and with legal "regularity and so appear on their face the officer is justified." And the fact was the attachment was issued by competent authority and with legal regularity.

Referring again to the authorities cited in the main brief of the respondent we ask the examination of the following further authorities affirming the same principle.

In *Wimbush vs. Wofford,* 33 Texas, 109, the deputy clerk in his own name issued a citation which was an original writ and the Court held same void for want of jurisdiction.

In 81 *Illinois,* 34-39, the signature of the clerk was absent to the writ of execution and the Court held the writ conferred no power.

In *Greenleaf vs. Munford,* 19 Abbott's Practice, 469-476, the Court held "the signature of the Judge who grants the "warrant is no doubt indispensable to his validity."

In *Anderson vs. Jouett,* 14th Louisiana An., 614, the "orig-

Lawful on face
see also 79 Mass. 75.

"inal writ" not signed by the clerk was fatal to the validity of a judgment against "a party who has filed no answer or appear-"ance."

In *Hickman vs. Larkey*, 6th Grattan (Va.) 210, the writ not signed by the clerk was held null and void.

In 2d N. Y., 473-475, the principle announced was that to justify the officer he must prove "lawful warrant issued by "persons clothed with competent authority for that purpose."

All the cases cited by petitioner at the foot of page 27 of the brief are reviewed in respondent's brief on pages 28, 29, 30, 31 and 32, and are shown not only to apply to the principle contended for but do really confirm the position of the respondents in this case.

The case of *Amber and Leach*, West Va., pages 24 and 25, of petitioner's brief, is reviewed at pages 31 and 32 of respondent's brief, where it is shown that this case expressly holds that if *original* writ, "not signed by the clerk, are not "confirmed by the defendant, they are void in the broadest "sense of the word and are *mere nullities.*"

The case of *King vs. Belcher*, 30 S. C., 381, cited p. 24, Pet's brief, in which a "Deputy Clerk," that had not been appointed signed the judgment and the motion was to revive the judgment, the Court, held following in the case of *Clark and Melton*, 19th S. C., 498-507, that the signature of the clerk himself was not necessary to constitute the judgment in a Court of record, and therefore that the absence of the signature of the clerk, or the signature by one not appointed the deputy clerk, did not affect the validity of the judgment as the Court say:

> "We do not see why the signature as deputy clerk by one who was never regularly appointed to that office should be more fatal than by the absence of the signature by or for and in behalf of the clerk. Page 383, 384. See Clark & Melton, 19th S. C., 498-507."

In this case of *Clark vs. Melton*, the Supreme Court of South Carolina held that "under the Statute the judgment is

"issued from the Court, *not* from the attorneys or the clerk." 19 S. C., 507.

It has no application to this case where the signature of the clerk to this process is required by the Statutes of the United States, and the clerk must issue the process in Admiralty.

II.

In reply to the second proposition of the Government, that the monition was not void but at most only *voidable*. It was colorable and could have been *amended* in the suit in which it was issued.

We submit:

The case of *Railroad vs. Kirk*, 111 U. S., 486, in which a writ of error was amended is especially allowed by Section 1005 of the Revised Statutes, enumerating the particulars wherein the writ could be amended and in all "other particulars of form" and neither that case nor the case of *Miller vs. Texas*, 153 U. S., or any of the cases amending a writ of error, cited on pages 17, 18, 19 or 20 affect this case at bar, which is not a matter of form of the process, but a matter of substance, it being the validity of the *original* process bringing the res within the jurisdiction of the Court, and not of judicial writs issued by the Court to give effect to right of parties who are before the Court, whose rights have been adjudicated, or who have appeared, or by the process brought within the jurisdiction of the Court. In all the cases cited the motion was made by parties who had appeared and were in Court.

So also as to Section 954 of the Revised Statutes which refers only to matters of *form* and the "defects or want of "form" whereas we submit under the authorities quoted this is a matter of substance.

So also the U. S. Revised Statutes, Section 948, allowing the amendment of any process returnable to or before it, *where the defect has not prejudiced and the amendment will not injure the party against whom such process is issued.*"

This Statute has never been construed to allow an amend-

ment to a process where the process itself is invalid and as served is ineffectual to bring the party or the res within the jurisdiction of the Court.

The authorities are as follows:

In the case of *Brown vs. Pond*, 5 Fed Rep., 31, Judge Choate:

> "Under these decisions it appears that the defect in the process was one which the Court could not allow to be amended so as to *obtain jurisdiction* of the persons of the defendant, unless he had waived the objection and referring to the liberal provisions of the Code of New York which allowed amendments, in furtherance of justice, of any process by correcting a mistake in any respect, &c."

The Court held:

> *"Nor do they permit an amendment which would give effect and validity to an original process, ineffectual when served, to give the Court jurisdiction of the defendant. Such a defect clearly is one which affects the substantial rights of the adverse party."* .Pages 34 and 35.

And, referring to Section 954 of the Revised Statutes as to amendment, 5 Fed. Rep. pages 39-40, the Court also held:

> "It is as broad and liberal perhaps in its terms as any statute of amendment ever enacted. *I think, however, it cannot be held to be broad enough to permit an amendment of process which would make the process effectual for the purpose of giving jurisdiction over the person of the defendant which the process as served was ineffectual to do where he has not submitted himself to the jurisdiction, as in this case he has not done.* The Statute is to be construed as applying only in a case where the Court has acquired jurisdiction over the person of the defendant. If it has not done so all its acts are *nullities* to him."

On the same principle in the case of *Bell vs. Austin,* 13 Pick. (30 Mass. 93), the Court refused to allow an amendment of *original* process:

> "We may lay out of the case all those authorities cited to show that the amendment may be made in writs of execution and other judicial writs."
>
> "But a party until served with *original process* in contemplation of law is not before the Court, has no actual or constructive notice of its orders and cannot be bound thereby. And quoting the Statute that provided that 'no writ, process or proceeding shall be abated, arrested, quashed or reversed for any kind of circumstantial errors, mistakes, &c.' "

The Court says:

> *"The plain meaning is when the Court has jurisdiction of the person and the subject matter."*

The case of *Post vs. Brown* was followed by U. S. Judge Brown in the case of the *United States vs. Rose,* holding that the summons was defective in the material part was not amendable so as to obtain jurisdiction of the person when in its original form as served it did not obtain the jurisdiction of the person.

14th Fed. Rep., 681-682.

This case of *Brown vs. Pond,* was followed by Judge Brown in *United States vs. Riley,* 88 Fed. Rep., 480, 481 and 482.

The limit of amendment as decided by this Court is that the amendment under the Act of Congress is liable "unless it "appears that the alleged defect may have injured the com- "plaining party or that he would have been prejudiced if the "defect had been amended."

Semmes vs. U. S., 91 U. S., page 25.

And we submit that if a service of a process, either upon an individual or upon the res, is, when served, ineffectual to bring either the person or the res within the jurisdiction of the Court, and as served the process is void; that it cannot be

amended as to make it valid for the purpose of bringing the person of the res within the jurisdiction of the Court and that such amendment made of an *original* writ injures the party and is to his prejudice.

On the ground that they are not original writs and that the parties were before this Court and their rights already adjudicated, the following cases cited by petitioner are to be distinguished.

In *Hill vs. Haines,* 54 N. Y., 153, the Court held the *execution* may be amended by inserting the signature of the clerk. This was on the ground that the rights of parties had been judicially determined and the execution was ministerial act of the clerk, and Court has jurisdiction of parties.

In *I. Woods U. S.,* 193, the Court held it to be an irregularity if the deputy clerk signed his own name instead of the clerk to the writ of *venditioni exponas* and amendable. Here again the writ was in the nature of an execution issued under the judgment of the Court and rights of parties had already been adjudicated and the Court had jurisdiction of the parties.

147 *Arkansas,* 373-377 (1st S. W. R. 693). The Court held that the clerk's "omission to sign a writ and *execution* "issued *by him* and affixing by inadvertence the name of an- "other party can be amended."

It is to be observed that this case does not apply because the clerk, the officer having the power to issue the execution actually issued it. And, also, that it was a writ issued after the rights of the party had been determined and the defendant was actually in Court with a judgment against him and it was not an *original* writ to bring the defendant into the Court.

In the cases cited on page 28 of petitioner's brief as to amendment they cover the substitution of real party in interest and a successor of a party under the familiar principle of the substitution or adding of parties under the long practice of this Court, but they do not touch the question here.

In the case at bar the arrest warrant as we have seen is void because, not only not signed by the clerk but signed by a private, unofficial person to whom the deputy clerk, (not the clerk, however), had attempted to delegate a power which

could not be delegated; but more particularly still the process was "issued," that is allowed and granted, by this same private unofficial person, and being a process issued without authority of law, it was ineffectual to obtain the jurisdiction of the res, and it could not be amended so as to obtain the jurisdiction of the res when, as served, it was invalid as a legal process and had not in law obtained the jurisdiction of the res.

III.

Moreover, even if this process had been or could have been amended by the District Court in the libel suit so as to make the clerk sign the same and issue the same, nevertherless it would then still be a void process, because the District Court in Admiralty had in the libel filed, that is the case before it, no jurisdiction in rem, and no process *in rem,* as this warrant of arrest of the steamship Laurada, could lawfully be issued on this libel.

That the allegation of the libel constituted a personal action in common law and the subject matter thereof was not that of a maritime lien over which the Court would have jurisdiction in rem appears from an examination of the libel which was for the breach of an alleged charter party which is set forth at pages 49, 51, 52 and 53. The breach alleged being that "in expectancy of the prompt arrival of the steamship the said charterers had at *various ports* of Jamaica a valuable cargo of fruits perishable in their nature, ready for immediate shipment upon arrival of the said steamer." Page 44, par. 4th.

Paragraph six of the libel, page 48, which alleges the damage, states that by reason of the taking on of the said passengers, &c., as aforesaid and the landing of the same off the coast of Cuba, "said vessel was delayed in her arrival at the port of Kingston, Jamaica, and in consequence thereof the said cargo of fruit *awaiting her arrival* as aforesaid, was seriously injured and damaged." It is to be noted that the allegation is distinct that the delay damaged the fruits at the *various ports* in the island, and that they were ready for immediate shipment upon arrival of the said steamer, "and that the cargo

of fruit awaiting her arrival was seriously injured and damaged."

In other words, that the cargo of fruits were damaged in the ports and damaged on land. There is no allegation that the said cargo of fruit "awaiting shipment" were ever loaded on board the steamer Laurada or that they were ever damaged aboard the steamer Laurada.

The subject matter, therefore, of the libel was not a subject matter which gave the Court of Admiralty jurisdiction. This has been established by all authorities and it was for this reason that the District Court in that case in its decree held and decreed "That the libel herein be dismissed for want of jurisdiction of the Court in rem in this cause."

IV.

That the Admiralty Court had no jurisdiction in Kerr & Co. vs. Laurada also appears independent of the Decree.

In the case of *The J. E. Rumbell,* 148 U. S., p. 11, the Supreme Court says:

> "A maritime lien, unlike a lien at common law, may," said Mr. Justice Field, speaking for this Court, "exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing, that he may subject it to condemnation and sale to satisfy his claim or damages." "The only object of the proceedings *in rem* is to make this right, where it exists available—to carry it into effect. It subserves no other purpose." The Rock Island Bridge, 6 Wall. 213, 215. And in The Lottawanna, Mr. Justice Bradley, speaking of a lien given by a statute of Louisiana for repairs and supplies, said "a lien is a right of property, and not a *mere matter of procedure.*" 21 Wall, 558, 579.

Again in the *Corsair,* 145 U. S., 335, 348, the Court says:

> "There is no intimation of a lien or privilege upon the offending thing, which as we have already held, is

necessary to give a Court of Admiralty *jurisdiction* to proceed *in rem.*"

This opinion was delivered by Judge Brown, who wrote opinion in the *Resolute.*

In the case of *Cutler vs. Rae,* 7 How., 729, the Supreme Court says:

> "The Court of Admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law." (p. 731.)

And in that case, on the ground that there was no lien in a case of General Average, the Court said:

> "That this case in its principles is nothing more than a *common law action.*" (p. 732.)
>
> "And is not within the Admiralty jurisdiction, and libel dismissed." (p. 732.)

In the case of the Rock Island Bridge, 6 Wall, 215, the Court held that where there was no maritime lien, there was no jurisdiction in rem.

> "A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wheresoever that goes, and into whosesoever hands it may pass. The *only object* of the proceeding *in rem*, is to make this right, where it exists, available— to carry it into effect. It subserves no other purpose.
>
> "The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of *The Bold Buccleugh,*

7 Moore, 284, "A maritime lien," says that Court, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

This doctrine, as announced by the Supreme Court has been reaffirmed, as we have seen above, repeatedly, but has never been overruled to this day.

Under it the proceeding *in rem* does not exist without a maritime lien, and when there is no maritime lien, it cannot exist, and the Court has no jurisdiction *in rem* of the subject-matter.

The case particularly in point, sustaining our contention that the admiralty Court had no jurisdiction of the libel in this case is *Vandewater vs. Mills*. The Court held:

"Maritime liens are *stricti juris*, and will not be extended by construction."

Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel.

"The obligation between ship and cargo is mutual and reciprocal, and does not take place till the cargo is on board."

Vandewater vs. Mills, 19 How., 82. (Rubric.)

"If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship

does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his *personal action* for damages, as in other cases."

Idem, p. 90.

"We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject-matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the Court would extend the maritime lien by analogy or inference, for the sake of giving the libellant this remedy, and *sustaining our jurisdiction.* But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris,* will not be extended by construction."

Idem, p. 91.

"Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made and a *cargo shipped* under it."

Schr Freeman vs. Buckingham, et al, 18 Howard, 188.

Mr. Justice Davis in the opinion of the Court in the case of *The Lady Franklin,* 8 Wall, 325-329, says:

"The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until

> the cargo is on board, or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to reiterate it, or the principles which lie at its foundation."

And, again, in an opinion by Mr. Justice Davis, in the case of *The Keokuk,* 9 Wall, 517-519, he reiterates:

> It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on the vessel, as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it. The Freeman vs. Buckingham, 18 How, 188."

In the case of the William Fletcher, 8 Benedict, 537, 29 Fed. Cas., p. 1298, Judge Blatchford on the same point held:

> "That a breach of the contract created no lien on a vessel enforcible in the Admiralty."

The exact point made in the case was "that the facts alleged in the libel created no lien upon the vessel enforcible in Admiralty, therefore, this Court has no jurisdiction of the *subject-matter* of this action."

In the case at bar, which was an action *in rem,* is without any jurisdiction of the Court.

In the case *in re Cooper,* 143 U. S., 473, the Court held:

> "If want of jurisdiction appear upon the face of the proceedings they would prohibit."

In this case the want of jurisdiction appears upon the face of the proceeding under the authority of The Yankee Blade and *Vandewater vs. Mills,* in which cases no cargo being laden on board or delivered, the Court held there was no juris-

diction in the Court of Admiralty, and that case has been reaffirmed many times.

The Supreme Court in the case of *The Moses Taylor,* 4 Wall, p. 427, states the distinguishing feature of a suit *in rem,* as follows:

"The distinguishing and characteristic feature of such suit is that the *vessel* or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the *vessel* or thing itself which gives to the title made under its decrees validity against all the world."

The vessel was never in the custody of the law, or within the jurisdiction of the Court.

The case of *Vandewater vs. Mills,* 19 How., 84, held expressly that there was no *Admiralty jurisdiction* of a case where the cargo was not laden on board.

In the District Court, the exception was:

> "First Exception. That on the face of said libel it appears that the alleged cause, or causes of action therein set forth are not within the Admiralty and Maritime jurisdiction of this Honorable Court." (p. 84.)

The District Judge sustained the exception, and dismissed the libel. The Circuit Court affirmed the decree.

The Supreme Court affirmed this decree.

At page 92, the Court says:

> "That it did not give the Court of Admiralty jurisdiction, and it is a fit subject for the jurisdiction of the common law Courts." (p. 92.)

In this case, the damage, if any, to the cargo, was not on the ship, i. e., on the water, but on the land. And all damage to cargo or any other article or thing on the land, has always been held to be without the jurisdiction of the Admiralty.

Ex parte Phoenix Ins. Co., 118 U. S., 610, 618.
Cope vs. Vallette Dock Co., 119 U. S., 625, 626.

V.

The Court's attention is called to the fact that the claimant in the libel suit did not appear nor did he put in any answer, but appeared only for the purpose of making a motion to set aside the process, the warrant of arrest, on the ground that the same was not signed by the clerk or the deputy clerk, and there is filed in the record no pleading of any kind whatsoever by the claimant. The claim and the bond for delivery on the vessel alone were filed. Pages 55, 56 and 57 Record. The giving of bond is not a waiver of jurisdiction, the warrant being illegal and void, because the Admiralty Court had no jurisdiction in rem in the case.

This has been settled by a number of decisions.

The Berkeley, 58 Fed. Rep., 920, 923.
The Hungaria, 41 Fed Rep., 112.

The Fidelity, 8 Fed. Cas., page 1189; 16 Blatch. 569, decided by Chief Justice Waite:

> "And is not liable to seizure in a *suit in rem*"; and "that a stipulation filed to obtain the release of the tug is not a waiver of the liability of the tug to be sued *in rem.*" (1192.)

In *Pacific Nat. Bank vs. Mixte,* 124 U. S., 721, it was held that inasmuch as the attachment could not lawfully issue, the writ was *void,* and the bond given to secure its dissolution was also void; and giving the bond was no waiver, and the whole proceeding utterly null and void.

The Norma, 32 F., 414, citing cases decided "appearance cures jurisdiction only of the person, but not *in rem.*"

> "If the attachment clause was void for want of juris-"diction in the District Court to issue it, the seizure of "the property was a trespass and the stipulation a nullity, "irrespective of the reservation it contained."

Atlas vs. Disintergrating Co., 18 Wall., 299.

Therefore, even if there had been a personal appearance this would not have cured want of jurisdiction *in rem,* of the subject matter.

Therefore, independent of the decree of the District Court in *Kerr & Co. vs. Laurada,* page 60, fol. 70, the libel upon its face, and by its allegations was not a "subject matter" which gave the Court jurisdiction in rem, and no process in rem could lawfully issue from the Court under this libel.

No amendment could cure it or give jurisdiction.

VI.

THIS ACTION IS MAINTAINABLE AGAINST THE DEFENDANT.

In the opinion of the Circuit Court of Appeals the Court held that "the person who undertakes to maintain his action must at the time when the act which constitutes the alleged trespass is committed, either have the actual possession in him of the thing which is the subject of the trespass or must have constructive possession in respect to the thing being actually invested in him with the right to immediate possession. This latter doctrine is well declared in *Wilson vs. Haley Live Stock Co.,* 153 U. S., 39, in which the Court holds: A count in trespass *de bonis asportatis* for the taking and detaining of personal property can only be supported on the theory that the plaintiff was either its owner or entitled *of right* to its possession at the time of the trespass complained of."

And the Court held that the plaintiff under the evidence was the owner and was entitled *of right* to its possession at the time, against a marshal wrongfully in possession, and they held further upon the authority of *Van Brunt vs. Skenck,* 11 Johnson's New York, 377, that if the possession of the marshal had been *lawful* that the trespass against the collector could not be maintained, but inasmuch as the possession of the marshal was not lawful, therefore, the right of property and the immediate right to possession was in the owner and the action of the collector (as the testimony show of putting his inspector aboard the vessel and refusing to allow the vessel

PAGE CUT OFF

The owner was not actually dispossessed of the earnship. The Second Officer, Martin Johansen, stifies he " was on board of her continually dur- r her stay at Charleston." Page 37, folio 43 -- ge 40, folio 46.

to load and the taking of the vessel to the custom house dock and the written declaration of the collector in this case that he was detaining the vessel) was sufficient to maintain action.

Thas such a determination is right appears from the fact that in law the action of the marshal under a void process is as declared by the Courts, not only illegal but a "nullity" (authorities supra) in the eye of the law, and if it is a "nullity," it cannot be legally averred that the marshal was in possession or that his presence was of any legal avail whatsoever.

In *Woodruff vs. Halsey*, 8th Pick, 335, trespass may "be maintained by one who has actual or constructive possession. Constructive possession is when the general owner although the chattel is in the actual possession of another, has a *right* to reclaim it immediately, the person in possession not being entitled to retain it against his will." As in all the cases.

See also *Martindale vs. Booth*, 3 Barn. and Adolph 498, 23 E. C. L. 130.
Barrett vs. Warren, 3 Hill., 348.

In *Smith vs. Miles*, 1st Term Report, 480, it was held to entitle a man to bring trespass he must have at the time the act was done actual possession or constructive possession in *respect of the right* being actually vested in him."

VII.

THIS ACTION IS MAINTAINABLE ALSO AGAINST DEFENDANT FOR UNLAWFUL DETENTION.

The practice of the State of South Carolina is under the Civil Code and there is but "one form of action for the enforcement or protection of private rights and the redress of private wrongs which is nominated a Civil Action."

Sec. 89 Code of 1902, Vol. 2.

All other forms of Civil actions are abolished.

The actions for taking, or detaining, or for injuring, or for recovering any goods or chattels are regarded as separate actions. Section 112 of the Code paragraph 4. (Id.)

The complaint in this case which alleges the seizing, that is, the taking of the steamship by the collector and also alleges the detaining by the collector, states *two* distinct causes of action under the Code. The damages are alleged in the complaint to flow from the *detention* by the collector for twenty-one days and not alone from the taking. It is sufficient to prove the cause of action for detaining, to support the damages alleged to flow therefrom independent of the question whether the collector took technically, that is committed a technical trespass under the common law. If the collector joined the marshal in detaining the steamship, he is liable under the allegations of the complaint.

The nature of the wrong done by the defendant in this case is shown by the following testimony:

C. B. Simons, one of the marshal's guards testified that:

"Q. He, (the collector's inspector), was on board there like you were?
A. Yes, sir.

On cross-examination:

Q. Did you take the vessel away from the inspector?
A. No, sir.
Q. Sure of that?
A. Yes, sir.
Q. You never turned him, (that is the inspector), off when he came there?
A. No, sir.
Q. Never tried to do that?
A. No, sir."

Pages 25-26.

The testimony of John P. Hunter, U. S. Marshal at the time of the seizure, was as follows:

"A. The collector had a talk with me about *putting a man on with my guard* and I think I told him it was *all right*.

Q. And you permitted him?
A. Yes, sir."

Page 26, folio 31.

On objection, the collector attempted to explain what he meant by the letters in evidence of the 6th December and of the 20th November, he wrote to Senator M. C. Butler, counsel of the Laurada in reply to Senator Butler's request enquiring if he was *detaining* the steamer on behalf of the United States, but the Court ruled that it was incompetent for the collector to put his interpretation as to what he meant by the letters, but it was competent for him to state any conversation he had with Senator Butler representing the Steamship "Laurada." Page 30, fol. 35. And thereupon the collector testified that he had no conversation whatever with Senator M. C. Butler. His communication with the owner of the Laurada through counsel was confined to the letter in evidence found at pages 68-69, which upon the challenge of the owner of the Laurada through counsel, M. C. Butler, to the collector, if he was detaining the Laurada, he stated without qualification not only "that I am detaining the steamer Laurada on behalf of the United States" but he further declared he would not permit her to proceed.

As a matter of fact the collector did have his inspector on board and he did declare to the owner then and there "I am detaining the vessel" and further evidence of his joint physical detention and joint prevention of the Laurada proceeding in her freight engagement is that in addition the ship was put in the dock and at the wharf of the custom house which was under the exclusive control of the U. S. Collector.

This evidence appears in the testimony of C. W. Townsend, Stevedore, who was ready to load her.

"Q. Where did she go to?
A. Savannah Railroad Wharf.
Q. Did you load her?
A. No, sir.
Q. Were you ready to load her?

A. Yes, sir.
Q. In the usual course of her previous loading?
A. Yes, sir.
Q. Why were you not allowed to load her?
A. I went aboard of her and the officer *stopped me;* wouldn't let me.
Q. Officer of the United States?
A. Yes, sir.
Q. *Custom House officer was that?*
A. I think it was.
Q. Where was she afterwards taken?
A. To the *Custom House Wharf.*
Q. Was she loaded at the Custom House Wharf?
A. No, sir."

Pages 14-15, Record.

This testimony, therefore, shows a direct interference by the custom's house officer, that is the collector's, in refusing to allow the vessel to load, to carry out her freight engagement and which confirms the testimony or the documentary evidence of the collector himself in his letter to Senator M. C. Butler at the time. That "I am detaining the vessel." This evidence that the vessel was actually prevented from loading by the collector and actually taken to the custom house wharf, that is on the premises of the collector, show that whatever the marshal may have done or may then be doing, the collector was then also actually detaining and actively preventing her loading, and such testimony is responsive to and in full proof of the allegations of the complaint herein that the said defendant "under an alleged authority and direction of the Government of the United States unlawfully and wrongfully *detained* the said Steamship "Laurada" at the *Custom House Wharf* in the port and harbor of Charleston in the District of South Carolina and refused to allow said steamship to proceed in the due fulfillment of her freight engagement for the space of twenty-one days, to-wit: from the 16th day of November, 1895, to and inclusive of the 6th day of December, 1895."

It is not testified anywhere that the marshal prevented the loading of the steamer, but that this refusal to allow her to load, which prevented the steamship to proceed in the due fulfillment of her freight engagement as alleged in the complaint, was done by custom house officer under the collector.

And even if it were independently established that the marshal took possession, and had as we contend a wrongful possession, this does not defeat this action, the gist of which and the damages for which is the unlawful *detention* in the nature of an action of detinue under common law as to which the authorities are all agreed is that the gravamen is not the *taking* but the *detaining* and it is only necessary to prove in support thereof the detaining or the *participation* of any person wrongfully in such detention.

This evidence fully proves not only the detention but the *participation* therein by the collector in—First: Putting his own man aboard, representing him in the physical detention; secondly: In the removal of the steamship to the custom house wharf, which are the premises of the United States under the exclusive possession and control of the collector, and the delay by the prevention of loading by the custom house officer.

The gist and gravamen of this action, causing the alleged damage was the *detention* and the proof is conclusive, as set forth above, that not only did the collector detain as he declared in writing at the time, but that with the consent of the marshal his inspector went aboard and was actually guarding the vessel along with the marshal's guard in the detention thereof, and also preventing the loading of cargo and holding the vessel at custom house wharf where she had been removed.

Under these facts there is a cause of action against both parties who were *actually participating* in physical acts of wrongful detention, confirmed by the written declaration of the collector at the time to the counsel of the owner of the Laurada that he was actually detaining the vessel on behalf of the United States.

In Chitty on Pleadings, Vol. 1, 16th American Edition, pages 136-137, the old common law action detinue is founded on the general property of the goods and right to immediate possession "but that the gist of the action is *wrongful detaining*, not original taking."

And the same authority, page 138, further says "if the defendant represents he has the goods and thereby induces the owner to bring an action against him he is liable although it does not appear, he had the general controlling power over the goods."

Chitty on Pleadings, 138 Vol. 1, 16th Amer. Edition.

Even if not technical trespass of the common law, still the action may be maintained for the *participation* in the *wrongful detention.*

In *Hunt vs. Pratt*, 7th R. I., 288, cited by petitioners, "the plaintiff finding officers in possession directed him by writ of attachment to detain them for the security of his debt against another whose goods he was advised they were." The Court held it was not trespass, but unlawful detention, saying:

"It would be new law indeed if the mere unlawful *detainer of goods, or participation in such an act* amounted to that forcible invasion of owner's possession of them that the law denominates a *trespass.* Looking at what defendant did we find an absence of that character and degree of wrong which subjects him to the punishment as a *trespasser.*"

"For every such wrong there is a remedy, not only against the officer whose duty it is to act lawfully, but against *all who unite with him.*"

Gonsouland vs. Rosomano, 176 Fed. Rep., 486, and cases cited.

"In actions *ex delicto* the rule is that if the tort is of such a nature that it can be committed by two or more persons in combination, the injured party may bring an action against all wrongdoers, against any part of them, or against one of them, or may bring a separate action against each one or against any part of the whole." Pomeroy Remedies & Remedial Rights, Sec. 281.

"In general those who have united in the commission of a tort on the person or property, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. He may at his option sue all the wrongdoers in a single action or he may sue anyone or he may sue each in a separate action or may sue any number he pleases less than all. The fullest liberty is given him in this respect. Pomeroy Remedies & Remedial Rights, Section 307.

"The same general doctrine controls the action of replevin or *detinue* or to recover possession of chattels, which at the common law was regarded as a personal action based upon the tortuous act of the defendant in his *wrongful detention* or taking of the goods. If, therefore, there is a joint wrongful taking or *detention* of the goods the action would lie against the wrongdoers jointly although one of them may have parted with his actual possession." Pomeroy, Sec. 310.

That there was concert of action and combination of force to detain the vessel for the space of twenty-one days is shown by the actual detention by the guards, both of the collector and of the marshal (both acting unlawfully as we have shown) is very clear from all the evidence.

Both the detention and the *participation in the act of detaining* is here fully proven. This cause of action for which the damages are claimed, that is, the "loss of the use and earnings of said steamship for twenty-one days," the time, during which the collector did, with the marshal, so wrongfully detain the vessel, is also established beyond controversy. Complaint, page 3.

We submit that the judgment of the United States Circuit Court of Appeals should be affirmed.

J. P. K. BRYAN,
Counsel for Roxana S. Ker,
Respondent.

Oct, 1911.

tody of the marshal and the inspector is withdrawn before the possession of the marshal terminates.
163 Fed. Rep. 233, reversed.

THE facts, which involve the validity of process of the District Court and the power and duty of the marshal thereunder, are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Loring C. Christie* was on the brief, for petitioner.

Mr. J. P. Kennedy Bryan for respondent:

The *Laurada* was illegally detained by the collector. Section 5290, Rev. Stat., did not justify the detention. The policy of the Government is not to make the private citizen bear the damage caused by an unlawful act of this nature; even if there was probable cause, or a direction of the Secretary of the Treasury, or officer of the Government, which did not constitute due process of law, or was not a legal justification, the Government would pay out of its own Treasury the damage to the private citizen. *Hendricks* v. *Gonzales*, 67 Fed. Rep. 351; *The Conqueror*, 166 U. S. 123, 124, 125. See, also, *Cruickshank* v. *Bidwell*, 176 U. S. 81, 82, and *DeLima* v. *Bidwell*, 182 U. S. 179; *United States* v. *Sherman*, 98 U. S. 566, 567.

The *Laurada* was not in the custody of the law, as the marshal was acting under a void warrant issued in the cause, and the court had no jurisdiction, and was himself without any authority of law, and a trespasser equally with the defendant, the collector of the port.

Where there is no jurisdiction or power to issue the warrant in the person issuing it, as in this case, the writ is not voidable but void, affording no protection to the person executing it. *Boyd* v. *United States*, 116 U. S. 627; as to who can issue writs see §§ 555, 558, 991, Rev. Stat.; Benedict's Admiralty, p. 231; Hawkins' Pl. C., Bk. 2, c. 13, § 21; 1 Hale Pl. C. 577, 1st ed., 1680, 287, and see

also *Starr* v. *United States*, 153 U. S. 617; *State* v. *Vaughan*, Harper (So. Car.), 313; *Davis* v. *Sanders*, 40 So. Car. 507; *Confiscation Cases*, 20 Wall. 93, 111; *Leas* v. *McVitty*, 132 Fed. Rep. 511; *Paper Co.* v. *Rock River Co.*, 19 Fed. Rep. 252; *Gardner* v. *Lane*, 14 No. Car. 53; *Covell* v. *Heyman*, 111 U. S. 176; *The Resolute*, 168 U. S. 437; *Bank* v. *Mixter*, 124 U. S. 721; *The Berkeley*, 58 Fed. Rep. 920, 923; *Erskine* v. *Hohnbach*, 11 Wall. 616; *Stutsman Co.* v. *Wallace*, 142 U. S. 309; *Railroad Co.* v. *Kenney*, 19 Fed. Cas. 484; *Jacob* v. *Measines*, 79 Massachusetts, 74; *Dynes* v. *Hoover*, 20 How. 80. The warrant must be from the proper officer, Troup, §§ 756–762; Meechun, §§ 6090 *et seq.;* Cooley on Torts, 2d ed., §§ 538, 546. For other cases which held that a warrant such as the one involved in this case is void and affords no protection, see *Wimbish* v. *Wofford*, 33 Texas, 109. And see 81 Illinois, 34, 39; *Greenleaf* v. *Munford*, 19 Abb. Pr. 469, 476; *Anderson* v. *Jouett*, 14 La. Ann. 614; *Hickman* v. *Larkey*, 6 Gratt. 210. And as to cases where the warrant was lawful on its face, see 79 Massachusetts, 75, and 67 Massachusetts, 45. In fact the warrant was a mere nullity. See 2 N. Y. 473.

The writ could not have been amended under § 954, Rev. Stat., and see *Brown* v. *Pond*, 5 Fed. Rep. 31; *United States* v. *Rose*, 14 Fed. Rep. 681; *United States* v. *Riley*, 88 Fed. Rep. 480; *Semmes* v. *United States*, 91 U. S. 25.

Even if the process was amendable as to signature it was void *in rem* as the court had no jurisdiction and that appears independently of the decree in the suit in which the writ was issued. *The J. R. Rumbell*, 148 U. S. 11; *The Corsair*, 145 U. S. 335, 348; *Cutler* v. *Rae*, 7 How. 729; *Vandewater* v. *Mills*, 19 How. 82; *The Schooner Freeman*, 18 How. 188; *The Lady Franklin*, 8 Wall. 325, 329; *The Keokuk*, 9 Wall. 517; *The William Fletcher*, 8 Benedict, 537; *In re Cooper*, 143 U. S. 473; *The Moses Taylor*, 4 Wall. 427.

The action is maintainable against the collector as a

BRYAN, COLLECTOR OF THE PORT OF CHARLESTON *v.* KER, EXECUTRIX.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3. Argued October 25, 26, 1911.—Decided November 20, 1911.

Although a writ which the court has power to issue in a proper case may have been irregularly issued, the marshal is authorized and bound to act thereunder if it comes into his hands as an apparently valid writ.

Although the attempted delegation of authority may have been ineffectual to clothe the person signing a writ with power to do so, the marshal is protected in executing it, if it is in the usual form and bears the seal of the court; such an irregularity can be cured by amendment substituting the signature of the person properly authorized.

If process *in rem* is apparently valid and it does not appear on the face thereof that the libel on which it is issued discloses only a personal action for damages the marshal is protected in executing it.

A collector of the port cannot be held responsible for detention of a vessel because he places an inspector thereon with orders to detain her if she attempts to sail, if at the time the vessel is validly in cus-

joint trespasser and because the owner was entitled to possession as against the marshal. *Wilson* v. *Haley Co.*, 153 U. S. 39; *Van Brunt* v. *Schenck*, 11 Johns. 377; *Woodruff* v. *Halsey*, 8 Pick. 335; *Martindale* v. *Booth*, 3 B. & A. 498; *Barrett* v. *Warren*, 3 Hill, 348.

The collector is liable if only participating in the detention. *Gonsonland* v. *Rosomano*, 176 Fed. Rep. 486; Pomeroy's Remedies, § 281, 307–10.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action at law in the Circuit Court for the District of South Carolina, by a citizen of Pennsylvania against a citizen of South Carolina, as collector of the port of Charleston, to recover damages for the alleged unlawful detention, from November 16 to December 5, 1895, of the American steamship *Laurada*, of which the plaintiff was the owner.

The answer admitted that the defendant, as such collector, acting under instructions from the Secretary of the Treasury, caused the vessel "to be formally detained by placing an inspector on board;" but alleged that the marshal for the District of South Carolina had seized the vessel on November 15, 1895, under a monition and warrant of arrest issued out of the District Court for that district upon a libel filed in that court against the vessel, her engines, etc.; that the marshal retained the custody of the vessel, under that process, from November 15 until December 18, 1895, and that, if any damage was sustained by the plaintiff by reason of the detention of the vessel, it did not result from any act of the defendant.

Upon the trial of the issue so presented the evidence, without any conflict, established these facts:

On November 15, 1895, the marshal, acting upon the monition and warrant of arrest soon to be mentioned,

seized the vessel at Charleston and detained her in his custody until December 18, following, when she was surrendered to her master upon the execution of an agreement, with sureties, conformably to Rev. Stat., § 941, and the 11th admiralty rule. On November 16, while the vessel was so in the custody of the marshal, the defendant, as collector of the port, acting under directions from the Secretary of the Treasury, placed an inspector on board the vessel and thereby assumed a qualified control over her; but the custody of the marshal was not disturbed or questioned, or intended to be, the defendant's purpose being only to make sure that the vessel would be detained, according to the directions of the Secretary of the Treasury, in the event that the custody of the marshal should be terminated. On December 6, the Secretary of the Treasury abandoned the purpose to detain the vessel, and the defendant thereupon withdrew the inspector, the marshal still retaining his custody.

The monition and warrant of arrest under which the marshal acted was issued out of the District Court upon the libel presently to be described, and what was done by him was in strict conformity to the command of the writ. When the writ was issued the clerk of the District Court was fatally ill and absent from his office, and the deputy, his son, was attending him. A second son, who was not a deputy, was temporarily in charge of the clerk's office, with instructions, given by the deputy, to receive and file papers, and, if it became necessary, to sign and issue process. Acting upon these instructions, the brother signed and issued the writ in question, doing so in such manner that it purported to have been signed and issued by the deputy on behalf of the clerk. The libel upon which the writ issued purported in some respects to be one *in rem*, but it plainly disclosed that the libellants were not possessed of a maritime lien upon the vessel, her engines, etc., but only of a right to damages. (See *Vandewater* v. *Mills*, 19 How.

82, 90.) There was, however, no suggestion of this on the face of the writ, which was in the usual form of a monition and warrant of arrest in a suit *in rem*. It ran in the name of the President, was addressed to the marshal, commanded him to seize the vessel and to detain it until the further order of the court, bore *teste* of the judge of the District Court, was sealed with the seal of the court, purported to be signed by the deputy on behalf of the clerk, and was transmitted from the clerk's office to the marshal's office in the usual way.

At the conclusion of the evidence showing these facts, the court, at the request of the defendant, directed a verdict in his favor, and entered judgment accordingly. The judgment was subsequently reversed by the Circuit Court of Appeals, 163 Fed. Rep. 233, and the case is now here on certiorari. 212 U. S. 575.

As it is obvious that the verdict for the defendant was rightly directed, if the seizure and detention of the vessel by the marshal were justified by the writ under which he acted, we come at once to the reasons advanced for saying that his acts were not so justified. They are, (1) that the writ was not signed or issued by the clerk or his deputy, but by one who was without lawful authority, and (2) that the case stated in the libel, upon which the writ issued, was not cognizable as a suit *in rem* in admiralty, but only as a personal action for damages.

Neither reason is sufficient. Both overlook considerations which operated with impelling force to justify the acts of the marshal.

True, the purported signature of the deputy was not his own, but was affixed by his brother under an attempted but ineffectual delegation of authority, and yet the writ, in the usual form, was issued from the office of the clerk, bearing the seal as evidence of its authenticity. In short, although thus irregularly issued, it came into the hands of the marshal as an apparently valid writ. Besides, this ir-

regularity did not render the writ void, but voidable merely, for it could have been amended by substituting the true for the purported signature of the deputy. Rev. Stat., § 948; *Texas & Pacific Railway Co.* v. *Kirk*, 111 U. S. 486; *Miller* v. *Texas*, 153 U. S. 535; *Semmes* v. *United States*, 91 U. S. 21; *Cotter* v. *Alabama G. S. Railroad Co.*, 61 Fed. Rep. 747; *Long* v. *Farmers' State Bank*, 147 Fed. Rep. 360; *Ambler* v. *Leach*, 15 W. Va. 677.

True, also, the case stated in the libel was not cognizable as a suit *in rem* in admiralty, and therefore afforded no basis for the issuance of the warrant of arrest. But as this did not appear on the face of the writ, and as the court was empowered to issue such process in a proper case, it still must be said that the writ, as it was received by the marshal, was apparently a valid one.

In this situation the case falls clearly within the rule, often applied in this and other courts, which is well stated in Cooley on Torts, 3d ed., Vol. 2, p. 883, as follows:

"The process that shall protect an officer must, to use the customary legal expression, be *fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

See *Conner* v. *Long*, 104 U. S. 228, 237; *Matthews* v. *Densmore*, 109 U. S. 216; *Harding* v. *Woodcock*, 137 U. S. 43; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309; *Marks*

v. *Shoup*, 181 U. S. 562; *Erskine* v. *Hohnbach*, 14 Wall. 613; *Haffin* v. *Mason*, 15 Wall. 671; *Bragg* v. *Thomson*, 19 So. Car. 572; *Goodgion* v. *Gilreath*, 32 So. Car. 388; *Clarke* v. *May*, 2 Gray (Mass.), 410; *People* v. *Rix*, 6 Michigan, 144; *Henline* v. *Reese*, 54 Oh. St. 599; *Savacool* v. *Boughton*, 5 Wend. (N. Y.) 170.

The judgment of the Circuit Court of Appeals is accordingly reversed and that of the Circuit Court is affirmed.

Reversed.